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MUNICIPAL CORPORATION CASES

ANNOTATED.

A COLLECTION OF ALL

CASES AFFECTING MUNICIPAL CORPORATIONS
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS JOHNSON MICHIE.

VOLUME I.

GEO. R. B. MICHIE & CO., PUBLISHERS,
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MUNICIPAL CORPORATION CASES.

VOLUME I.

KEYES

v.

CITY OF CEDAR FALLS.

(*Supreme Court of Iowa, Feb. 3, 1899.*)

Fall into Excavation—Knowledge of Officer as Knowledge of City.—In an action against a city for personal injuries resulting from a fall at night into an unlighted and unguarded excavation dug for an area to a building in course of construction, knowledge of the danger on the part of a member of the firm constructing the building is imputable to the city, as he was at the time of the accident a member of the city council and chairman of the committee on streets and alleys, the contention that such firm had no permit to make the excavation, and were therefore trespassers, and that it was the interest of such member of the firm to keep from the city notice of the fact that he had dug the area, being without merit.

Builders—Use of Street.*—In the absence of evidence to the contrary, the presumption is that builders have a right to use a reasonable portion of the street in excavating for foundations and areas.

Contributory Negligence.—A person has a right to rely upon the assumption that the city has done its duty, and it is not negligence for one to pass over a sidewalk at night without a light.

Instructions.—In such action it was not error to fail to refer to an electric light, which was within a block and a half of the scene of the accident, in the instructions referring to the negligence of the city.

Same—Failure to Follow Physician's Directions.—It was not error to refuse to instruct that plaintiff could not recover for any damage accruing after his failure to observe the directions of his physician, the proper instruction on such subject being that no damages should be allowed for any injurious effects resulting from the failure to observe such directions.

*See notes at end of case.

Keyes *v.* City of Cedar Falls

Mortality Tables.*—There being evidence tending to show that plaintiff was permanently injured, it was not error to tell the jury that mortality tables, which were introduced in evidence, were of importance when estimating damages.

Damages—Instructions.*—It was not error to instruct that damages should be allowed for the injury, the pain and suffering caused thereby, past, present, and future, and the expenses for medical attention; and that there was no rule for the measure of such damages, but that it was a question for the jury; and if defendant desired more explicit instructions, they should have been requested.

Declarations—Harmless Error.—If it was error to allow plaintiff to merely state, that a short time after the accident, he told certain persons he had met with such accident, it was harmless error.

Res Gestæ.—Declarations, if they are near enough in point of time with the principal transaction to clearly appear to be spontaneous and unpremeditated, and free from sinister motives, and afford a reliable explanation of the principal transaction, are admissible in evidence.

Evidence—Harmless Error.—If it was error to allow plaintiff to testify that he was compelled to sell out his business because of his injuries, it was harmless error.

Same—Pecuniary Circumstances.—If it was error to admit evidence showing that plaintiff, after the accident, was in destitute circumstances, such error was cured by instructing that his pecuniary circumstances could not be considered in estimating damages.

Declarations as to Suffering.—Whenever the physical or mental condition of a person is at issue, expressions or declarations of present existing pain, whether made at the time the injury was received or subsequently, are admissible in evidence, regardless of the person to whom made.

APPEAL by defendant from Blackhawk county district court. *Affirmed.*

H. C. Hemenway and *O. B. Courtright*, for appellant.

Mullen & Pickett, for appellee.

DEEMER, J. At the time of the happening of the accident in question, plaintiff was a resident of the town of Nashua. He had gone to the city of Cedar Falls on business connected with one of the mills located at that place, and on the 25th day of April, 1892, at about 9 o'clock p. m., while returning from the mill to his hotel, fell

Case Stated.

*See notes at end of case.

into an excavation which had been dug in the street in front of a brick building which was then being constructed, and received the injuries of which he complains. The building was being erected by the firm of Clay & Olbrich, of which firm H. E. Olbrich, a member of the council of defendant city and chairman of the committee on streets and alleys, was a member. The excavation into which plaintiff fell extended into the street from 3½ to 4 feet, was from 3 to 5 feet deep, and from 4 to 5 feet in length. It was dug as an area for a basement window in the new building. Olbrich had ordered it dug, and the workman engaged for the business commenced his work at about 10 o'clock of the day on which plaintiff was injured, completing his task at about 6 o'clock. The sidewalk extended up to the edge of the excavation, and the hole was left unguarded and without barricades or warning lights. The night of the 25th was dark, and plaintiff had no knowledge of the area way left in the street. While passing along on the way to his hotel, he fell and received his injuries. As soon as he was able, he returned to the mill from whence he started, sat down in a chair, and made the remarks which will be hereinafter referred to. His claim now is that he was seriously and permanently injured by the fall, and that the city is liable because of its failure to barricade or guard the excavation.

1. One of the questions in the case was, of course, the defendant's knowledge or notice of the defect in the street. As Olbrich directed the work to be done, and knew what its character would be when completed, he certainly had both knowledge and notice of the excavation; and ordinarily his knowledge would be the knowledge of the city, because of his relation to it. Carter *v.* Town of Monticello, 68 Iowa, 178, 26 N. W. 129; Owen *v.* City of Ft. Dodge (Iowa) 67 N. W. 281; Trapnell *v.* City of Red Oak Junction, 76 Iowa, 744, 39 N. W. 884. But it is contended that, as Olbrich had no authority from the city to make the excavation, it was to his interest not to convey the knowledge he possessed to the city, and

Fall into Excavation—Knowledge of Officer as Knowledge of City.

that the presumption of knowledge on the part of the city does not obtain. There are certain cases where notice to an agent will not be imputed to his principal, as where the agent has forgotten, or may have forgotten, during the agency; where he cannot tell his principal because of professional confidence; or where his interests are so adverse to those of his principal that it is certain he will conceal the information. The case of Hummel *v.* Bank, 75 Iowa, 689, 37 N. W. 954, illustrates one of these exceptions. It is there said: "The notice to the principal of such facts as were known to the agent, and even present in his mind, at the time of the transaction, but the knowledge of which was not acquired in the business of the agency, is constructive. Ordinarily, the circumstances are such as to beget a presumption that the communication was in fact made. But when they are of such character that, according to all human experience and observation, the probability is just the reverse, it would be absurd to indulge that presumption." In the case before us, Olbrich and the city were equally interested in having the excavation so guarded as that injury would not result; for each was responsible for all damages that might result, and there is every reason to suppose that an agent so interested would convey his knowledge to his principal. But it is argued that, as Clay & Olbrich had no permission to make the excavation, they became trespassers, and that it was to Olbrich's interest to keep from the city notice of the fact that he had dug the area for his window. It does not appear from the evidence that defendant required building permits or licenses to be issued to those who would build up to the street lines, and, in the absence of such requirements, builders had the right to temporarily use a reasonable portion of the street for building material and in excavating for foundations and cellars. O'Linda *v.* Lothrop, 21 Pick. 297; Clark *v.* Fry, 72 Am. Dec. 590. Areas for light, and basement windows and descents, are necessary, in order to carry on business in a city, and, if such excavations are properly guarded or cov-

Builders—Use of Street.

ered after completion, they do not, in themselves, constitute a nuisance. 2 Dill. Mun. Corp. (4th Ed.) § 656b. It may be that, as the city has full control over its streets (Code 1873, § 561), it may and should specify the conditions under which such excavations may be made; and it is likely true that, if one makes an excavation in a street without permission, he is liable for all damages done. Davis *v.* City of Clinton, 50 Iowa, 585. But in this case it appears that the city knew that Clay & Olbrich were occupying the street, and making excavations for their building, and they entered no protest against it. There is no evidence whatever that either Clay or Olbrich was attempting to gain any advantage of, or to perpetrate any fraud upon, the city; and there is no reason for supposing that concealment of the fact that they were making the excavation would have been to their advantage. Such a hole in the surface of the street would be apparent to the most casual observer, and there could have been no thought of concealment in the mind of Olbrich when he ordered the work done. None of the exceptions to the general rule that notice to the agent is notice to the principal obtain, and the trial court correctly instructed that notice to Olbrich was notice to the city.

2. Appellant insists that plaintiff was guilty of such negligence contributory to his injury as that he ought not to recover, and it says in argument that plaintiff had no right to go where it was so dark he could not see what he was doing, citing Perry *v.* City of Cedar Falls, 87 Iowa, 315, 54 N. W. 225. The instruction given in that case which contains the language relied upon by appellant was not approved, and it is so opposed to the tenor of authority that we do not think it ever will be. The rule is well settled that a person has the right to rely upon the assumption that the city has done its duty, and that it is not negligence for one to pass over a sidewalk at night. He is not bound to carry a light with him to see that there are no pitfalls in the walks he contemplates using. Streets and sidewalks are designed for use at all hours of

Contributory Negligence.

the day or night, and it is not negligence for one to venture out after dark. Improvement Co. *v.* Loehr (Ind. Sup.) 24 N. E. 579; Barnes *v.* Town of Marcus, 96 Iowa, 682, 65 N. W. 984; Robinson *v.* City of Cedar Rapids (Iowa) 69 N. W. 1064; Moore *v.* City of Burlington, 49 Iowa, 136; Ross *v.* City of Davenport, 66 Iowa, 551, 24 N. W. 47.

3. The instructions with reference to the negligence of the city are complained of because they did not refer to an electric light which was within a block and a half of the scene of the the accident. It is doubtful, to say the least, whether this light was burning at the time plaintiff received his fall; but, be that as it may, it was not error to omit to refer to it in the instructions. The negligence charged was failure to erect or place any barrier, sign, or signal at the scene of the accident, to notify the public of its dangerous condition. The court fully instructed as to this claim, and it was not error, in the absence of proper request, to omit references to the electric light. The jury had the right, under the instructions given, to consider the presence or absence of the street light.

Instructions.

4. Evidence was offered tending to show that plaintiff did not observe the directions of his physician called after he received his injuries, and the defendant asked an instruction to the effect that plaintiff could not recover for any damage accruing after his failure to comply with these directions. This instruction was refused, but the court instructed that such fact, if proven, was proper to be considered, and that no damages should be allowed plaintiff for any impairment of health or physical condition occasioned by his neglect to observe such directions. The instruction given announced the correct doctrine, and the one asked was properly refused. Beach, Contrib. Neg. § 59; City of Goshen *v.* England (Ind. Sup.) 21 N. E. 977; Stebbins *v.* Railroad Co., 54 Vt. 464. The pivotal point in determining whether there is contributory negligence is not whether plaintiff contributed to the amount of the injury, but

Same—Failure to Follow Physician's Directions.

to the occurrence. If to the amount, then his negligence is treated as aggravating the damage, not as causing it.

5. The mortality tables were offered in evidence, and it is claimed that the court below erred in saying to the jury that such tables were of importance in enabling them to determine the amount of plaintiff's damages, provided they found he was permanently injured. We have frequently held that such evidence is admissible in cases where the injured party is permanently disabled. Knapp *v.* Railway Co., 71 Iowa, 41, 32 N. W. 18; Chase *v.* Railway Co., 76 Iowa, 675, 39 N. W. 196; Allen *v.* Railway Co. (Iowa) 76 N. W. 848. The very purpose of such evidence is to enable the jury to arrive at the amount of damages to be awarded. There is little, if any, evidence tending to show that plaintiff was not able-bodied, sound in health, and physically strong before he met with his fall. And there was evidence tending to show that his injuries were permanent. From this view point, it is clear that there was no error in the instruction given. If defendant desired further instructions as to plaintiff's ability to earn full wages during the whole of his expectancy of life, it was its duty to ask them in proper form. Moreover, the court instructed that plaintiff could not recover any damages caused or contributed to by plaintiff's previous injuries.

Mortality Tables.

6. Further, it is said that the instructions relating to the measure of damage were incorrect and misleading. We need not set them out *in extenso*. It is sufficient to say that the court said, in effect, that plaintiff was entitled to compensation for injury to his person, and the pain and suffering caused thereby, past, present, and future, provided the evidence showed a probability of such future suffering; and also for the expense incurred by medical attention; and that there was no rule for the measure of such damages, but that the amount was left to the best judgment of the jury. Then follows this extract: "As before stated, you will allow for his pain, suf-

Damages—Instructions.

fering, and expense of medical treatment, and any injury. This may be temporary or permanent, as you may find, arising from that injury alone, if any; keeping in mind that, if you are satisfied from the evidence that any part of his present physical condition comes from a prior injury, or from lack of following the treatment ordered by his physician, or from any other disease not resulting from this injury, this you must exclude from the estimate." If there was any error in these instructions, it was favorable to appellant, as they did not cover some things which plaintiff was entitled to have considered. In any event, the instructions were good as far as they went, and, if defendant desired further or more explicit ones, it should have asked them. Railroad Co. *v.* Hedge (Iowa) 62 N. W. 887; Railroad Co. *v.* Burgess (Ala.) 22 South. 169; Railroad Co. *v.* Freeman (Ga.) 10 S. E. 277.

7. When plaintiff came back to the mill, which was immediately after his fall, he dropped into a chair, and was sitting there, when one Lemmers, an employee at the mill, discovered him. His hat and coat were covered with dirt, and he had a frightened appearance. Lemmers asked what was the matter, and plaintiff thereupon responded that he had fallen into an excavation and was hurt. Plaintiff, on his examination, was also permitted to testify that, within three minutes from the time the accident occurred, he told Lemmers and a man by the name of Hanson about what had occurred. All this evidence was objected to, but the objections were overruled. It may be that plaintiff's evidence as to his having told these persons about his having been hurt was irrelevant and immaterial, but, if so, it was without prejudice, for he did no more than say that he told them. Evidence as to what he said to them was not given by plaintiff. The testimony of Lemmers, if admissible at all, was proper, as part of the *res gestæ*. Appellant claims that what plaintiff said was a narrative or statement made after the main transaction was

Declarations—Harmless Error.

ended, and was therefore inadmissible. It is often difficult to determine when a statement or declaration is a part of the *res gestæ*. The rule we have heretofore announced is that, if they are near enough in point of time with the principal transaction to clearly appear to be spontaneous and unpremeditated, and free from sinister motives, and afford a reliable explanation of the principal transaction, they are admissible in evidence. State *v.* Jones, 64 Iowa, 349, 17 N. W. 911, and 20 N. W. 470; McMurrin *v.* Rigby, 80 Iowa, 322, 45 N. W. 877; State *v.* Driscoll, 72 Iowa, 583, 34 N. W. 428; Frink *v.* Coe, 4 G. Greene, 555. See, also, Insurance Co. *v.* Mosley, 8 Wall. 397; Keyser *v.* Railway Co. (Mich.) 33 N. W. 867. We think the declaration made by plaintiff was so connected in point of time and with the main transaction, and came so spontaneously, that it was admissible as part of the *res gestæ*. The evidence was clearly competent, as explanatory of plaintiff's appearance, as there was no time for him to have invented a false statement. Plaintiff was also permitted to testify, over defendant's objections, that he was compelled to sell out his business because his physical condition was such that he was not able to conduct it. The mere fact that he sold his business was probably immaterial to any inquiry in the case. But the fact that he was unable to attend to his business by reason of his injuries was very material. The statement as to why he sold was but another way of saying that he was unable to carry on or conduct the business in which he was engaged before he received his injuries, and we think it was proper. In any event, the error was without prejudice. Wade *v.* Leroy, 20 How. 34; Kinney *v.* Crocker, 18 Wis. 80; Smay *v.* Etnire (Iowa) 68 N. W. 597.

Res Gestæ.

Evidence—Harmless Error.

8. Complaint is made of the admission of the evidence of witnesses Smith and Laberee. Smith testified that he was one of the township trustees, and, over defendant's objection, said that he was called upon to furnish aid to plaintiff and his family, and at the

Same—Pecuniary Circumstances.

time made an investigation as to plaintiff's ability to perform labor. He also testified, without objection, that he found plaintiff was unable to perform labor. Laberee testified that he was also one of the township trustees, and, over defendant's objection, said that he made an investigation as to plaintiff's physical condition and ability to perform work, and that he found his ability to perform manual labor was not very good. He further testified, over defendant's objection, that the township trustees furnished aid to plaintiff and his family after plaintiff received his injuries. After Laberee had given his testimony, defendant moved to strike out all of that part of it relating to his investigation made in his official capacity, and all that part upon which he based his knowledge of plaintiff's condition. This motion was sustained. Defendant also moved to strike out the witness' conclusion as to plaintiff being able to work, and all the evidence relating to his determination of plaintiff's capacity to work, which was used as a basis for furnishing aid, and the statement said to have been made to him by plaintiff that he (plaintiff)was unable to work. This motion was also sustained. The court further instructed the jury as follows: "You are further instructed that there has been stricken out of this case the evidence of one witness who testified concerning aid furnished the plaintiff by his township since the commencement of this case. You are instructed that you must exclude from your mind any and all impressions created by such testimony stricken out. But the testimony of one witness was received on that subject. You are instructed that it was received only as tending to show his inability to labor at the time it was so furnished. But you are instructed that you must consider it only for such purpose, and that you must not consider it for the purpose of showing the pecuniary condition of plaintiff, as you are instructed that that cannot be taken into consideration by you in estimating the damages to which the plaintiff is entitled, if any." It will be noticed that Smith did not testify that any aid was

furnished to plaintiff. All he said was that he was called upon to furnish aid,—not that he did so,—and that he made an investigation as to plaintiff's ability to perform labor. The result of that investigation, as detailed by the witnesses, was not objected to. The instruction explicitly advises the jury that they are not to consider the evidence as to aid furnished the plaintiff by the township trustees, and the error, if any, in the admission of the testimony, was cured. State *v.* Postlewait, 14 Iowa, 449; Cook *v.* Robinson, 42 Iowa, 476; State *v.* Spurbeck, 44 Iowa, 669; Davis *v.* Danforth, 65 Iowa, 601, 22 N. W. 889; Redfield *v.* Redfield, 75 Iowa, 436, 39 N. W. 688; Shepard *v.* Railway Co., 77 Iowa, 56, 41 N. W. 564; Gall *v.* Dickey, 91 Iowa, 127, 58 N. W. 1075; State *v.* Helm (Iowa) 66 N. W. 753. This answers all the objections made by appellant to the evidence of these witnesses.

9. Plaintiff's wife was permitted to testify, over defendant's objection, that her husband, after he received his injuries complained from time to time of having pains in his back. The admission of this evidence is complained of. There seems to be a conflict in the authorities regarding the admission of such evidence. See Fay *v.* Harlan, 128 Mass. 244; Earl *v.* Tupper, 45 Vt. 275; Taylor *v.* Railway Co., 48 N. H. 309; Railroad Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836; State *v.* Gedicke, 43 N. J. Law, 86; Hyatt *v.* Adams, 16 Mich. 180, Quaife *v.* Railway Co., 48 Wis. 513, 4 N. W. 658,—holding that such evidence is admissible; and Railroad Co. *v.* Mara, 26 Ohio St. 185, and Roche *v.* Railroad Co., 105 N. Y. 296, 11 N. E. 630, apparently holding to the contrary. Our own cases are not as consistent as we might wish. In Gray *v.* McLaughlin, 26 Iowa, 279, we said: "The expressions of one suffering from bodily pains or illness, relative to his health, are admissible in evidence, being the natural consequences and usual indication of suffering and sickness,"—citing Greenleaf and Phillips on Evidence. In the case of Ferguson *v.* Davis, 57 Iowa, 601, 10 N. W. 906, a majority of the court held that evidence to the effect that the

injured party complained of suffering in his back was inadmissible. No reference was made to the case in 26 Iowa, however, and there was a dissent from the conclusion of the majority. In Winter *v.* Railway Co., 74 Iowa, 448, 38 N. W. 154, plaintiff was permitted to prove at the trial certain statements made by himself, to the effect that he suffered pain from the injury, and that, owing to his injuries, he was not able to perform certain kinds of work. The admission of this evidence was held to be error, this court saying: "Very clearly, a party is not entitled to introduce his own statements and declarations in proof of the very matter in issue when they are not themselves the subject of action." It does not very clearly appear whether the statements that he suffered pain related to his then condition or to a past state of mind. But it is apparent that his declarations that he was unable to work because of his injuries were inadmissible. What is said in the opinion clearly relates to these declarations, and not to complaints of present pain. Examination of the authorities cited in support of the rule show that this is the reason why the rulings of the trial court were held to be erroneous. The question again arose in Blair *v.* Madison Co., 81 Iowa, 313, 46 N. W. 1093, and we there said: "The witness was asked to state what complaints of pain or disease plaintiff made about a week after the accident. It is now insisted that, as plaintiff's complaints were no part of the *res gestæ*, they were not admissible. They were not admitted on that ground, but for the reason that his complaints of pain or disease were competent to show the condition of his health, which was in issue under his claim that he was severely and permanently injured. The statements or declarations of plaintiff were properly shown in evidence." Again, in McDonald *v.* Franchere, 102 Iowa, 496, 71 N. W. 427, we held, in effect, that such declarations are admissible. See also Stone *v.* Moore, 83 Iowa, 186, 49 N. W. 76, Armstrong *v.* Town of Ackley, 71 Iowa, 76, 32 N. W. 180, and Aryman *v.* City of Marshalltown, 90 Iowa, 350, 57 N. W.

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867, all holding to the same doctrine. The weight of reason and authority supports the rule admitting such evidence, and the court, as now constituted, is of opinion that the Ferguson Case is wrong and should be overruled. Whenever the physical or mental condition of a person is in issue, expressions or declarations of present existing pain, whether made at the time the injury was received or subsequently, are admissible in evidence. Such expressions and statements as to the locality of the malady or pain are exceptions to the general rule which excludes hearsay evidence, and they are admitted on the ground of necessity, as being the only means of determining whether pain or suffering is endured by another; and they are admissible, regardless of the person to whom made; and whether they are simulated or not is a question for the jury. Some other rulings in the admission of evidence are complained of. It is not important that we set them out; sufficient is it to say that the rulings were correct.

Declarations as to Suffering.

10. Lastly, it is said that the verdict is excessive and contrary to the instructions of the court. The trial court reduced the verdict from $4,500 to $3,000. As so reduced, we do not think it was excessive. There is ample evidence to sustain the finding of the jury, and the verdict is in accord with the instructions given by the court. No prejudicial error appears, and the judgment is affirmed.

NOTES.

Excavations in Streets by Abutting Owners.—A municipal corporation has the right to forbid excavations under the sidewalk unless made according to its prescribed regulations. Davis *v.* Clinton, 50 Iowa 585. *Compare* Gregsten *v.* Chicago, 40 Ill. App. 607.

But it is held in some states that excavations under the sidewalk by abutting owners may be authorized. Fisher *v.* Thirkell, 21 Mich. 1, 4 Am. Rep. 422; Everett *v.* Marquette, 53 Mich. 450. *Compare* Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Kuechenmeister *v.* Brown (C. Pl.), 34 N. Y. Supp. 180. But see Brezee *v.* Power, 80 Mich. 172; Ellis *v.* McNaughton, 76 Mich. 237, 15 Am. St. Rep. 308.

And in *Indiana* the rule is that the municipality is not liable for

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permitting such excavations to remain open. Lafayette *v.* Blood, 40 Ind. 62. *Compare* McCarthy *v.* Syracuse, 46 N. Y. 194; Wolf *v.* Kilpatrick, 101 N. Y. 146, 54 Am. Rep. 672.

But, generally, the rule is that injuries resulting to passers-by from such excavations are actionable. Barry *v.* Terkildsen, 72 Cal. 254, 1 Am. St. Rep. 55; Stephani *v.* Brown, 40 Ill. 428; Brown *v.* Evans, 15 Kan. 88; Irvine *v.* Wood, 51 N. Y. 224, 10 Am. Rep. 603; Kuechenmeister *v.* Brown, (C. Pl.), 34 N. Y. Supp. 180; Congreve *v.* Smith, 18 N. Y. 79; Whalen *v.* Gloucester, 4 Hun (N. Y.) 24; Anderson *v.* Dickie, 1 Robt. (N. Y.) 238; Creed *v.* Hartman, 29 N. Y. 591, 86 Am. Dec. 341; Mairs *v.* Manhattan Real Estate Assoc., 89 N. Y. 498; Jennings *v.* Van Schaick, 108 N. Y. 530; Stevenson *v.* Joy, 152 Mass. 45; Dickson *v.* Hollister, 123 Pa. St. 421, 10 Am. St. Rep. 533; Papworth *v.* Milwaukee, 64 Wis. 389. See *contra*, Lafayette *v.* Blood, 40 Ind. 62; Calder *v.* Smalley, 66 Iowa 219, 55 Am. Rep. 270; Portland *v.* Richardson, 54 Me. 46, 89 Am. Dec. 720; Kirkpatrick *v.* Knapp, 28 Mo. App. 427. *Compare* Augusta *v.* Hafers, 59 Ga. 151; Nelson *v.* Godfrey, 12 Ill. 22.

Mortality Tables.—In an action for wrongful death, the standard of life or mortality tables are admissible in evidence for the purpose of showing the probable duration of the life of the deceased, for the purpose of estimating damages where his earning capacity has been shown. Rowley *v.* London, etc., R. Co., L. R., 8 Exch. 221; Coates *v.* Burlington, etc., R. Co., 62 Iowa 486, 15 Am. & Eng. R. Cas. 265; Denver, etc., R. Co. *v.* Woodward, 4 Colo. 162; Kansas Pac. R. Co. *v.* Lundin, 3 Colo. 94; Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1; South Western R. Co. *v.* Paulk, 24 Ga. 356; Central, etc., R. Co. *v.* Richards, 62 Ga. 306; Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409; Georgia, etc., R. Co. *v.* Oaks, 52 Ga. 410; Central R. Co. *v.* Crosby, 74 Ga. 737; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280; Blair *v.* Madison County, 81 Iowa 313; Louisville, etc., R. Co. *v.* Miller, 58 Am. & Eng. R. Cas. 304; Donaldson *v.* Mississippi R. Co., 18 Iowa 280; Walters *v.* Chicago, etc., R. Co., 41 Iowa 71; Shover *v.* Myrick, 4 Ind. App. 7; Louisville, etc., R. Co. *v.* Mahony, 7 Bush (Ky.) 235; Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 125; Johnson *v.* Hudson River R. Co., 6 Duer (N. Y.) 633. Sauter *v.* New York Central, etc., R. Co., 66 N. Y. 50; Steinbrunner *v.* Pittsburgh, etc., R. Co., 146 Pa. St. 504; McCue *v.* Knoxville, 146 Pa. St. 580; Mississippi, etc., R. Co. *v.* Ayres, 16 Lea (Tenn.) 725; San Antonio, etc., R. Co. *v.* Bennett, 76 Tex. 151; McKeigue *v.* Janesville, 68 Wis. 50; Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 27 Am. & Eng. R. Cas. 291.

But in Klanowski *v.* Grand Trunk R. Co., 57 Mich. 525, 21 Am. & Eng. R. Cas. 648, it was doubted whether a computation of the

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probabilities of life of deceased made by a witness who based them on Haswell's tables was competent; two of the judges thinking that it was not, but the verdict was not disturbed in that case, as CHAMPLAIN, J., did not think that the jury was mislead by the testimony and concurred with SHERWOOD, J., who thought the testimony admissible in sustaining the trial court.

Encyclopædia Britannica.—The Encyclopædia Britannica being a familiar work of science of unquestioned authority, may be introduced to show such tables. Worden *v.* Humeston, etc., R. Co., 76 Iowa 310, 38 Am. & Eng. R. Cas. 199; Shover *v.* Myrick, 4 Ind. App. 7.

Johnson's Encyclopædia.—In Gorman *v.* Minneapolis, etc., R. Co., 78 Iowa 509, a witness having testified that he considered Johnson's New Universal Encyclopædia a standard scientific work, its admission for the purpose of showing the expectancy of life, was held no error.

The Carlisle Tables.—In Steinbrunner *v.* Pittsburgh, etc., R. Co., 146 Pa. St. 504, it was held that the Carlisle Tables, being based upon general population, and not upon selecting insurable lives, were admissible, *distinguishing* Shippen's Appeal, 80 Pa. St. 391; Shover *v.* Myrick, 4 Ind. App. 7; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280; Worden *v.* Humeston, etc., R. Co., 76 Iowa 310, 38 Am. & Eng. R. Cas. 199.

Northampton Tables.—The Northampton Tables were held admissible in Georgia, etc., R. Co. *v.* Oaks, 52 Ga. 410; Sauter *v.* New York Cent., etc., R. Co., 66 N. Y. 50.

Not Indispensable.—In Atchison, etc., R. Co. *v.* Hughes, 55 Kan. 491, 2 Am. & Eng. R. Cas., N. S., 248, it was objected that no mortality tables were introduced to show the probable duration of the life of the deceased. The court held that while such tables are admissible in evidence to assist the jury in estimating the expectancy of life, they are not indispensable, but the jury may make that estimate from the age, life, habits, and physical condition of the person at the time of his death. *To the same effect* Deisen *v.* Chicago, etc., R. Co., 43 Minn. 454.

Expectation of Life of Deceased or of Plaintiff.—Where a father sued for the death of his son, it was held error to admit in evidence mortuary tables showing the expectation of life of the deceased; the expectation of the father's life being presumably shorter than the son's, the expectancy of the plaintiff should have been shown instead of that of the deceased. Illinois Cent. R. Co. *v.* Crudup, 63 Miss. 291.

Infant.—The computation should be made from the date of decedent's death, if an infant, and not from the age of twenty-one, although recovery dates from that time. Walters *v.* Chicago, etc., R. Co., 41 Iowa 71.

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Permanent Injuries.—Where the injuries received are permanent, though not resulting in death, it has been held that the life tables were admissible to show plaintiff's expectancy of life in estimating damages. Knapp *v.* Sioux City, etc., R. Co., 71 Iowa 41; Chase *v.* Burlington, etc., R. Co., 76 Iowa 675, 38 Am. & Eng. R. Cas. 148. *Overruling* Nelson *v.* Chicago, etc., R. Co., 38 Iowa 564.

Conclusiveness.—Though admissible, the tables are not conclusive. Central R. Co. *v.* Crosby, 74 Ga. 737; Hunn *v.* Michigan Cent. R. Co., 78 Mich. 513, 41 Am. & Eng. R. Cas. 452. Thus in Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 27 Am. & Eng. R. Cas. 291, it is said: "But it never has been held that the rules to be derived from such tables or computation must be the absolute guides of the judgment and conscience of the jury. Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. But what a jury in a case has to consider is the probable duration of the person's life in question, and in a case where the person is not killed but is injured, they are to consider the injury to his capacity to earn his livelihood, and, taken from the evidence before them, it is a controverted question whether the injury would be temporary or permanent. An instruction is erroneons which tends to mislead them by obliging them to ascertain the average injury to the person's capacity by the year, whether the extent of the injury would be constant or varying, and by giving them to understand that the tables were not merely competent evidence of the average duration of human life, and of the present duration of life annuities, but furnished absolute rules which the law required them to apply in estimating the probable duration of the person's life and the extent of the injury which he had suffered. So in Steinbrunner *v.* Pittsburgh, etc., R. Co., 146 Pa. St. 504, it is held that the value of such tables depends, when applied to a particular case, upon other matters, such as the state of health, habits of life, social condition, etc., of deceased, and the attention of juries should be called pointedly to these qualifying circumstances.

Judicial Notice.—With reference to the admission of evidence of the Carlisle and other similar tables, for the purpose of showing the "expectations" and probable duration of life, we think that they are to be received upon judicial notice of their genuineness and authoritativeness. As in regard to many other matters of which judicial notice is taken, it is proper for a court to inform itself in the premises by reference to books and other sources of information; but legal proof of such genuineness and authoritativeness is not required. In a given case it is for the court to say without such proof that they are or are not genuine or authoritative, and that

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they are or are not admissible accordingly. Stephens Ev., art. 59, and *note*; 1 Greenl. Ev., § 6. Such tables are, however, not conclusive, for there is not only a considerable variance in different tables, but they are not so compiled as to show the probable duration of life under any and all circumstances, but under particular conditions, so that their evidentiary value in a given case is largely analogical. Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 518, 19 Am. & Eng. R. Cas. 173.

Actions for Personal Injuries—Future Pain and Suffering as an Element of Damage.—In actions for personal injuries there may be a recovery on account of the physical suffering which the evidence shows the injured party will endure in the future.

United States.—Washington, etc., R. Co. *v.* Harmon, 147 U. S. 571; Union Pac. R. Co. *v.* Jones, 49 Fed. Rep. 343; Illinois Cent. R. Co. *v.* Davidson, 76 Fed. Rep. 517.

Alabama.—See South, etc., Alabama R. Co. *v.* McLendon, 63 Ala. 266.

Arkansas.—St. Louis Southwestern R. Co. *v.* Dobbins, 60 Ark. 481.

Delaware.—Wallace *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 529.

Georgia.—Atlanta, etc., R. Co. *v.* Johnson, 66 Ga. 259.

Illinois.—Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641; Consolidated Coal Co. *v.* Haenni, 146 Ill. 614; Illinois Cent. R. Co. *v.* Cole, 62 Ill. App. 480.

Michigan.—Sherwood *v.* Chicago, etc., R. Co., 82 Mich. 374.

Minnesota.—Johnson *v.* Northern Pac. R. Co., 47 Minn. 430.

Missouri.—See Bigelow *v.* Metropolitan St. R. Co., 48 Mo. App. 367.

New York.—Miller *v.* Fort Lee Park, etc., Co., 73 Hun (N. Y.) 150; Curtiss *v.* Rochester, etc., R. Co., 20 Barb. (N. Y.) 282; Kane *v.* New York, etc., R. Co., 132 N. Y. 160; Koetter *v.* Manhattan R. Co., 59 Hun (N. Y.) 623, 36 N. Y. St. Rep. 611.

Pennsylvania.—Smith *v.* East Mauch Chunk, 3 Pa. Super Ct. Rep. 495.

Texas.—Mexican Cent. R. Co. *v.* Mitten, 13 Tex. Civ. App. 653.

Wisconsin.—Kleigel *v.* Aitken, 94 Wis. 432; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 20 Am. St. Rep. 106; Nichols *v.* Brabazon, 94 Wis. 549.

Same—Bodily Pain and Suffering as an Element of Damages.—In actions for personal injuries the physical pain and suffering endured by the injured person is an important element of damage.

England.—Phillips *v.* London, etc., R. Co., 5 Q. B. Div. 78.

United States.—Saldana *v.* Galveston, etc., R. Co., 43 Fed. Rep. 862; Davidson *v.* Southern Pac. Co., 44 Fed. Rep. 476; Vicksburg,

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etc., R. Co. *v.* Putnam, 118 U. S. 546; Union Pac. R. Co. *v.* Jones, 49 Fed. Rep. 343.

Alabama.—South, etc., Alabama R. Co. *v.* McLendon, 63 Ala. 266; Alabama G. S. R. Co. *v.* Hill, 93 Ala. 514, 30 Am. St. Rep. 65; Louisville, etc., R. Co. *v.* Binion, 107 Ala. 645; Alabama G. S. R. Co. *v.* Burgess, (Ala. 1897) 22 So. Rep. 169.

Arkansas.—St. Louis, etc., R. Co. *v.* Blackburn (Ark. 1891) 15 S. W. Rep. 469; St. Louis Southwestern R. Co. *v.* Dobbins, 60 Ark. 481.

Connecticut.—Ashcroft *v.* Chapman, 38 Conn. 230.

Delaware.—Wallace *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 529.

Georgia.—Richmond, etc., R. Co. *v.* Williams, 88 Ga. 16.

Illinois.—Lake Shore, etc., R. Co. *v.* Johnsen, 135 Ill. 641; Chicago, etc., R. Co. *v.* Fisher, 38 Ill. App. 33; Central R. Co. *v.* Serfass, 153 Ill. 379, *affirmed* 53 Ill. App. 448; Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71; Illinois Cent. R. Co. *v.* Cole, 62 Ill. App. 480.

Indiana.—Terre Haute, etc., R. Co. *v.* Brunker, 128 Ind. 542; Cincinnati, etc., R. Co. *v.* Claire, 6 Ind. App. 390; Ohio, etc., R. Co. *v.* Dickerson, 59 Ind. 317.

Iowa.—Morris *v.* Chicago, etc., R. Co., 45 Iowa 29; Deppe *v.* Chicago, etc., R. Co., 38 Iowa 592; McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748; Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462; Moore *v.* Central R. Co., 47 Iowa 688.

Kansas.—Abilene *v.* Wright, 4 Kan. App. 708.

Louisiana.—Donnell *v.* Sandford, 11 La. Ann. 645.

Maine.—Campbell *v.* Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Blackman *v.* Gardiner, etc., Bridge, 75 Me. 214.

Maryland.—Bannon *v.* Baltimore, etc., R. Co., 24 Md. 108; Pittsburg, etc., R. Co. *v.* Andrews, 39 Md. 329.

Massachusetts.—Smith *v.* Holcomb, 99 Mass. 552.

Michigan.—Sherwood *v.* Chicago, etc., R. Co., 82 Mich. 374.

Minnesota.—Johnson *v.* Northern Pac. R. Co., 47 Minn. 430.

Mississippi.—Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

Missouri.—Bigelow *v.* Metropolitan St. R. Co., 48 Mo. App. 367; Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270; Whalen *v.* St. Louis, etc., R. Co., 60 Mo. 323.

Montana.—Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334.

Nevada.—Johnson *v.* Wells, etc., Co., 6 Nev. 224, 3 Am. Rep. 245.

New Hampshire.—Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541.

New Jersey.—Klein *v.* Jewett, 26 N. J. Eq. 474.

New York.—Koetter *v.* Manhattan R. Co., 59 Hun (N. Y.) 623, 36 N. Y. St. Rep. 611; O'Neil *v.* Dry Dock, etc., R. Co., 59 N. Y. Super.

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Ct. 123; Miller *v.* Fort Lee Park, etc., Co., 73 Hun (N. Y.) 150; Curtiss *v.* Rochester, etc., R. Co., 20 Barb. (N. Y.) 282; Ransom *v.* New York, etc., R. Co., 15 N. Y. 415; Kane *v.* New York, etc., R. Co., 132 N. Y. 160; Larkin *v.* New York, etc., R. Co.. (C. Pl.) 19 N. Y. Supp. 479; Walker *v.* Erie R. Co., 63 Barb. (N. Y.) 260; Morse *v.* Auburn, etc., R. Co., 10 Barb. (N. Y.) 621; Filer *v.* New York Cent. R. Co., 49 N. Y. 42, 10 Am. Rep. 327; Hamilton *v.* Third Ave. R. Co., 53 N. Y. 25; Niendorff *v.* Manhattan R. Co., 4 N. Y. App. Div. 46.

North Carolina.—Wallace *v.* Western North Carolina R. Co., 104 N. Car. 442.

Pennsylvania.—Pittsburg, etc., Pass. R. Co. *v.* Donahue, 70 Pa. St. 119; Wilson *v.* Pennsylvania R. Co., 132 Pa. St. 27; Pennsylvania R. Co. *v.* Allen, 53 Pa. St. 276; Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229; Breary *v.* Philadelphia Traction Co., 5 Pa. Dist. Rep. 95.

Texas.—Gulf, etc., R. Co. *v.* Glenk, 9 Tex. Civ. App. 599; Gulf, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1897) 40 S. W. Rep. 608; Missouri, etc., R. Co. *v.* McElree, (Tex. Civ. App. 1897) 41 S. W. Rep. 843; San Antonio, etc., R. Co. *v.* Keller, 11 Tex. Civ. App. 569; Galveston, etc., R. Co. *v.* Waldo, (Tex. Civ. App. 1895) 32 S. W. Rep. 783, Mexican Cent. R. Co. *v.* Mitten, 13 Tex. Civ. App. 653.

Utah.—Giblin *v.* McIntyre, 2 Utah 384.

Vermont.—Bovee *v.* Daniel, 53 Vt. 183.

Washington.—Cogswell *v.* West St., etc., Electric R. Co., 5 Wash. 46.

Wisconsin.—Waterman *v.* Chicago, etc., R. Co., 82 Wis. 613; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 20 Am. St. Rep. 106.

Recovery of Medical Expenses, Nursing, etc.—In order that plaintiff, in an action to recover for personal injuries, shall be entitled to recover for expenses incurred in the way of physician's or surgeon's fees, medicines, medical attendance and nursing, it is not necessary that such amounts should have been actually paid, provided the plaintiff has rendered himself liable to pay the same. Dixon *v.* Bell, 1 Stark, 287, 2 E. C. L. 114; Consolidated Coal Co. *v.* Scheiber, 65 Ill. App. 304; Chicago *v.* Honey, 10 Ill. App. 538; Mueller *v.* Kuhn, 59 Ill. App. 353; Varnham *v.* Council Bluffs, 52 Iowa 698; Abilene *v.* Wright, 4 Kan. App. 708; Lacas *v.* Detroit City R. Co., 92 Mich. 412; Minneapolis Threshing-Mach. Co. *v.* Regier, 51 Neb. 402; Friend *v.* Ingersoll, 39 Neb. 717; Reynolds *v.* Niagara Falls, 81 Hun (N. Y.) 353; Chacey *v.* Fargo, 5 N. Dak. 173; Lutcher, etc., Lumber Co. *v.* Lyson, (Tex. Civ. App. 1895) 30 S. W. Rep. 61; Wilson *v.* Southern Pac. Co., 13 Utah 352.

Nursing by Members of Plaintiff's Family.—The plaintiff in an action for damages for personal injuries cannot recover for the nursing and attendance of the members of his own household,

unless they are hired servants. The care of his wife and minor children in ministering to his needs involves only, it is said, the performance of the ordinary offices of affection which is their duty. Such services involve no liability on the part of the plaintiff, and, therefore, afford no basis for a claim against the defendant, as for expenses incurred. A man may hire his own adult children to nurse him in an illness caused by personal injuries, or to treat him therefor, in the same manner and with the same effect that he may hire other persons, but in the absence of an express contract the law will not presume one, so long as the family relation continues. WILLIAMS, J., in Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1. And see Peoria, etc., R. Co. *v.* Johns, 43 Ill. App. 83.

TWIST

v.

CITY OF ROCHESTER *et al.*

(*Supreme Court of New York, Appellate Division, Feb. 3, 1899.*)

Electric Wires—Patrol Lines—Negligence—Liability of City.*—A city is responsible for negligence in the construction and maintenance of a patrol wire erected under a contract with the city for the use of the police department, but which could be used by the city for any legitimate purpose.

Same—Negligence—Question for Jury.—It appeared that the patrol wires, one of which inflicted the injury, were put up without sufficient guards to protect them, among the trees of the avenues, where they were liable, by the swaying of the limbs, to be detached from the poles, and connect with the charged trolley wires below, although a safer line for the patrol line could have been selected; and that the city had permitted the patrol wires, after they had been abandoned, to fall into the street time and again. *Held*, that there was sufficient evidence of negligence on the part of the city to be submitted to the jury.

Knowledge of Officers.—Knowledge of the unsafe condition of such wires on the part of the city officer who had charge of them is imputable to the city.

Contributory Negligence.—The evidence as to contributory negligence on the part of the deceased, being conflicting, was properly submitted to the jury.

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*As to Liability of Municipality, see generally 15 Am. & Eng. Enc. Law, p. 1141.

Twist *v.* City of Rochester

Concurring Causes.*—Where an injury is the combined result of negligence of defendant, and an accident for which neither plaintiff nor defendant is responsible, defendant is liable, unless the injury would have happened had defendant not been negligent.

Instructions.—The trial court did not charge that defendant should have removed its wires to another place, and that they should have been originally erected in another place, the two charges on the subject, when taken together, being correct.

Damages.—A verdict for $5,000 for the negligent killing of a minor son will not be disturbed as excessive.

APPEAL by plaintiff from Monroe county trial term. *Affirmed.*

Argued before HARDIN, P. J., and FOLLETT, MCLENNAN, and SPRING, JJ.

Benjamin V. Cunningham, for appellant.
Thomas Raines, for respondent.

WARD, J. The city of Rochester, on the 1st day of July, 1887, entered into a contract in writing with the Rochester Electric Light Company of that city, a domestic corporation (which will be referred to as the "Company"), whereby the company agreed to furnish, from time to time, poles suitable for supporting its electric lamps for street lighting in the city, and poles or underground conduits for its wires for transmitting electricity for such lamps at such place or places and in such numbers as the city, by its common council, should from time to time, during the continuance of the contract, direct; to keep the poles properly painted; and to set, and from time to time, as might be required, to change, the same, at its own expense, under the direction of the common council, and in such place or places as the common council should direct, and keep in first-class condition said lamps and all appurtenances thereto or connected with the same. And the contract further provided as follows:

Case Stated.

"The party of the first part [the company] shall also place and at all times maintain in good condition a suitable cross-

*See note at end of case.

arm on each pole erected and placed by it as aforesaid at the top thereof, or such other location as may be agreed upon by the party of the first part and the said common council; or, in case of an underground conduit or conduits, there shall be at all times kept in good condition a suitable space therein. And the party of the first part shall grant to the party of the second part [the city] and its agents the exclusive use of said cross-arm or space aforesaid, free of charge, at any time during the period thereof [the existence of the contract], for any and all municipal purposes, and placing of any and all telegraph or other electric wires owned and used by it other than for lighting and power. The party of the first part shall also, upon the requirement of the common council, immediately remove any and all of its poles after its or their use have been discontinued for three consecutive months."

The contract further provided that the common council should at all times freely inspect the works, plants, dynamos, lamps, wire, and all apparatus connected therewith of the company, and the quality and condition of the wire and lamps used in and about the furnishing of such lights. The city further agreed to take and use, during the continuance of the contract, at least 100 electric lights, and pay for the same at a rate fixed; the contract to terminate on the 1st day of July, 1892.

Pursuant to this contract, and in the year 1888, the company erected poles along and on both sides of Mount Hope avenue, one of the most prominent streets in the city, which runs substantially north and south, and near the east bank of the Genesee river, and nearly parallel with a water channel called the "feeder," the avenue intersecting Edgewood avenue (known in the case as "Sandford Street") and Cypress street, they being on the east side of the avenue; and between these two streets occurred the death of the plaintiff's intestate, from a charge of electricity, on the evening of July 15, 1892. The east bank of the feeder in the vicinity of these intersecting streets was about 100 feet from the west side of Mount Hope avenue. The poles erected by the electric light company

were about 40 feet high. One of these poles was on the east side of the avenue, at the corner of Sandford street. Diagonally across and on the west side of the avenue was another pole, nearly opposite to a structure known as the "Church Home." On the east side of the avenue, and further south, and opposite of the premises of one J. L. Pauckner, another pole was located. On the west side of the avenue, and still further south, diagonally from the last-named pole, stood a pole, opposite of Cypress street. The direct distance from the first to the last named pole was 400 feet, and the distance along the diagonal line was about 443 feet. Prior to 1890 the Rochester City & Brighton Railway Company had operated a street-surface railroad, by means of horses, through Mount Hope avenue. This railroad, in March, 1890, was leased to the defendant the Rochester Railway Company, with all its franchises and property. In the spring of 1890, upon application made to the common council of the city, that body granted leave, by resolution, to the Rochester Railway Company, to construct its line in the avenue; and an agreement was entered into between it and the city to change the motive power of said street railway from horses to electricity, and the Rochester Railway Company equipped its road, and began its operations, by the trolley system, through Mount Hope avenue. It was provided that the work must be satisfactory to the proper city authorities; and, when they required it, the company should place guard wires to prevent the trolley wire from coming in contact, by reason of accidental breakage or otherwise, with electric, telephone, or other wires; that the company should cause to be maintained sufficient electric current through the guard wires to ring a bell at the central station in the event of any wire falling or coming in contact with the guard wires; and the proper city authorities should have general charge and supervision of the kind and quality of poles to be erected, the location of the same and the work of construction of the railway company. The railway company constructed two tracks through Mount Hope avenue, with poles 18 feet high,

and wires for electric currents in the street; the line of said poles passing under the diagonal lines to which we have referred. After the construction of the electric and trolley lines, and in June, 1890, there was constructed upon the poles of the electric light company, through the agency of the city, a line of wires called the "Patrol Line." These wires were placed upon the poles about three feet above the electric wires, at the place reserved by the city for wires under the contract. There were no guard wires or tree supports constructed in connection with this patrol wire. The only fastenings were the fastenings to the insulators. The patrol wires were bare copper,—No. 12 wires. The electric company wires were No. 4 electric light wires, with, as the proof tended to show, defective insulation. The trolley wires were bare No. 4 copper wires. On both sides of the avenue were trees of considerable size, at short distances apart, the limbs of which projected into the street in the space between Sandford and Cypress streets, which interfered to a considerable extent with the electric light and patrol line. For a long time prior to the accident,—and the proof seems to indicate more than a year,—the city had abandoned the patrol line through Mount Hope avenue along the place of the accident, but left the wires unused, at times disconnected and broken, and were using a line along the east bank of the feeder, but connecting with the avenue further south. The patrol wire along or near the place of the accident, on several occasions, dropped into the street. On one occasion a horse was killed by the electric current from the fallen wire. At one time a wire fell down in front of William Pauckner's place, who had a store upon the corner of the avenue and Cypress street, which came down first about 16 months before the accident. When the horse was killed, it came down again, a few weeks before the accident; and, the last time it fell, Mr. Pauckner took it out of the way, burning 100 feet of it off, which he kept. The city never constructed another wire in the place of the one removed. This was one of the patrol wires. The other seems to have remained among the trees

until the time of the accident. Other witnesses speak of the wire being down on other occasions prior to the accident. The condition of the wire, and its falling before the accident, were brought to the actual knowledge of the officers of the city who had charge of the line, and whose duty it was to protect the public in regard to it.

The plaintiff's intestate was a son of the plaintiff; was 19 years old, a healthy, bright, industrious young man, living with his father, and earning wages, which he gave to his father. His only difficulty seems to have been a slight or partial deafness. He had been 15 months in the employ of a meat-market concern. On the night of the accident, he had a package of meat to deliver at the Church Home. He entered the avenue by way of Clarissa street, which was north of Sandford street, and passed along the east side, until he crossed over to the Church Home, on the west side, a few minutes before he was killed, where he delivered his package, and shortly returned. The time was from half past 8 to 9 o'clock in the evening, and it was quite dark, so that an object as large as a man could be seen but at a little distance. As he reached the trolley track between Sandford and Cypress streets, his neck encountered a patrol wire that had been disconnected from the pole, and had descended to within about four feet of the ground, when he received a charge of electricity which caused his immediate death. This electricity was communicated to the wire from the trolley wire. Shortly before this accident, a repair wagon in charge of two employees of the Rochester Railway Company came along, and discovered the wire running from what was called the "Church Home Pole." It came down from a tree which involved the patrol lines, and rested on the trolley wire. One of the employees pulled the wire down out of the tree to the point where it struck the deceased. There was some difficulty with the horses. The employee paused a moment, pulled on his gloves, with a view of again handling the wire. At that precise time the deceased came along, and was killed. At that time the company was not

running its cars on that branch of its road, as repairs were in progress, but its wires were charged with electricity the same as if the cars were in operation.

At the expiration of the contract with the electric light company, a new contract was made between it and the city, extending for several years. It continued in effect the relations between the parties as specified in the first contract; and, in the specifications which were made a part of the contract, it was provided that the poles and cross-arms were to be of a kind and size, and be subject to be changed or removed whenever, in the judgment of the common council, public safety or convenience demanded the same. A storm of wind and rain preceded the accident. The defendant contended that this was a very violent storm of wind and rain, one of the worst that had ever occurred, which caused the wire to become detached from the pole; it was not within the contemplation of the contract of the parties that the patrol line was to stand any such storm, but only ordinary storms in that locality. The plaintiff's proof tended to show that it was not an extraordinary storm for that time of the year (July). The weather observer testified that the velocity of the wind did not exceed 28 miles per hour. It appeared in the case that the feeder line was substantially free from trees, and was not subjected to the danger that was apparent as to the line among the trees in the avenue. The trial court fairly submitted the issues in the case to the jury, which found for the plaintiff, and we cannot disturb their verdict as being against the weight of evidence.

The appellant presses the point that it was not responsible for the defective construction of the patrol line, because it was used by the police department of the city, and as that department is created by law for the discharge of a public duty, and not for the immediate benefit of the city, the city is not liable for the negligence of the police commissioner in the construction and maintenance of the patrol wires, citing Wood-hull *v.* City of New York, 150 N. Y. 450, 44 N. E. 1038,

Electric Wires—Patrol Lines—Negligence—Liability of City.

and kindred cases. The difficulty with this contention is that the preponderance of the evidence does not show that the line was constructed by the police department or its servants, but was done by virtue of a contract with the city, and by city officers who were empowered to and did represent the city. The powers of the police department of Rochester are enumerated in the charter of the city, and the authority to create and operate telegraph lines as an independent body is not among its enumerated powers. That power rests, under the charter, with the city alone, to be performed through the agency of departments and officers that represent the city. If it be the fact that the city permitted the police to construct this line or to use it after it had been created, that does not bring the case within the principle claimed by the appellant. In Woodhull *v.* City of New York, *supra*, the action was against the cities of New York and Brooklyn for false imprisonment on account of the action of a police officer appointed and under the control of the Brooklyn Bridge trustees, as a street car was starting over the bridge. It was held that the cities were not responsible for the act of this policeman. Other cases may be cited where it was held that the municipality was not responsible for the acts of policemen who were acting under the orders of the police department, and within the scope of their police duties, and this is upon the principle that the police are appointed by the municipality in obedience to a statute to perform a public service, not local or corporate, and to perform a service in which the municipality has no pecuniary interest. But this rule and these cases have no application to a service performed by police officers without authority of law, in the pecuniary interests of the corporation. In such a case, when the police officer acts, it is outside of his public duties, and he becomes the servant of the municipality whose pecuniary interests he serves. The distinguishing feature is the character of the service he performs, and not the name or the title under which he performs it. The city had secured the right to put these wires upon the electric light pole for a

consideration. It had agreed to take a certain number of lights, and pay for them. The patrol line was the result of a business arrangement on the business side of the municipality and it was in no sense in furtherance of a public duty. When the line was made, the city could use it for any legitimate purpose connected with its police or otherwise, without changing the character of the thing from a private, pecuniary matter to a public one; but in highway or street cases another principle intervenes. The municipality in such cases is bound to use reasonable care to render the streets safe for public use and travel, and the decisions are uniform that where a municipal corporation permits a nuisance in its streets, or commits negligent acts, which result in injury to a person using the streets, the corporation is liable in damages to the person injured if he is free from contributory negligence, and cannot protect itself under the claim that its acts were so far public that it was free from responsibility. Turner *v.* City of Newburgh, 109 N. Y. 301, 16 N. E. 344. This duty in regard to the streets existed before the city permitted the invasion of the avenue by the Rochester Gas & Electric Company or by the Rochester Railway Company, and that duty continued with the additional care thrown upon the city as a result of introducing electricity into the street. The city had wisely reserved, by its contracts with these other parties, the right to protect the street as against this additional danger. It should have enforced those rights, and exercised reasonable care in exercising its powers under its contract to protect the public. The jury has found that it has failed to do so, and, as a result, the death of the intestate.

There was evidence of the defendant's negligence sufficient to be presented to the jury in this case. Some of the facts tending to prove such negligence may be enumerated.

Same—Negligence—Question for Jury.

The patrol wires were put up without sufficient guards to protect them, among the trees of the avenues, where they were liable, by the swaying of the limbs, to be detached from the poles, and connect

with the deadly currents below. There was evidence tending to show that a parallel and safer line for the patrol line could have been selected and used without difficulty. The city, when it permitted the trolley lines and the electric light lines to be constructed and continued directly under the patrol lines, which were liable to be detached, must have been cognizant of the dangers of the situation, and should have exercised care both of construction and inspection commensurate with that danger. It was guilty of gross negligence in permitting the unused patrol wires, after they had been abandoned, to fall into the street time and again, to the obvious danger of the people in the street. It is true that the current which passed through those falling wires is harmless; yet when they touched the bare wire of the trolley below, or even the electric wire above the trolley wire, they became immediately charged with a deadly force, liable to produce just such a result as in this case.

Knowledge of Officers.

But it is claimed that the city of Rochester was not liable under the city charter (Section 218), which provides that:

"The city of Rochester shall not be liable for any roadway being out of repair or unlawfully obstructed unless actual notice of the unsafe or dangerous condition has been given to the city officers having charge of the highways a reasonable time before the happening of such injury,"—citing Smith *v.* City of Rochester, 79 Hun, 174, 29 N. Y. Supp. 539, affirmed 150 N. Y. 581, 44 N. E. 1128.

In so far as the city is liable for the negligent construction of the patrol line, or the other negligent acts and neglect of duty to which we have referred, the city needs no actual notice, because it is presumed to know its own acts, and therefore has actual notice. As to its notice of the falling of the wire prior to the accident, Mr. Barnes, the superintendent, representing the city, and who had charge of the lines, and whose duty it was to see that it was kept in good condition, had actual notice. He testified that he remembered three occasions where the line had been broken down by one

means or another within two years preceding the accident. Stedman *v.* City of Rome, 88 Hun, 279, 34 N. Y. Supp. 737; Riddle *v.* Village of Westfield, 65 Hun, 433, 20 N. Y. Supp. 359; Wilson *v.* City of Troy, 135 N. Y. 102, 32 N. E. 44; Turner *v.* City of Newburgh, 109 N. Y. 301, 16 N. E. 344.

The learned counsel for the appellant strenuously contends that there should have been no recovery, because the deceased was guilty of contributory negligence. This objection is best answered by the charge of the learned trial judge upon that subject. After stating that it was incumbent upon the plaintiff to satisfy the jury by a fair preponderance of evidence that Edward Twist was not himself careless, and did not contribute to his death, and that if he went upon the street knowing that this wire was there, and walked into it carelessly, and met his death, no recovery could be had, then the court proceeds:

Contributory Negligence.

"The case shows that, at an earlier part of the evening than the time when the accident occurred, Edward Twist was near the corner of Clarissa Street, and there saw boys playing with a broken wire, and that he knew that there was a broken wire at that point. There is no evidence that he knew there was a loose or broken wire above [north] the Sandford street pole. It seems that later this wire was down between the Sandford street pole and the Church Home pole, which was the wire with which Edward Twist came in contact, and which caused his death. It appears that he was engaged in an occupation which required him to be in the street. He had a package of meat to be delivered, and the inference is fair that it was to be delivered at the Church Home; that he went there, and on his return he came in contact with this wire, and fell to the ground, and he was taken up dead. There is evidence tending to show that a warning was given. Some of the witnesses say that he was almost upon the wire when the cry came, and that he seemed to be bewildered, and turning his head towards the west side of the avenue, from which side,

some of the evidence tends to show, the alarm came, he came in contact with the wire. There is evidence from other witnesses that he was further from the wire when the warning was given. There is also evidence that his hearing was impaired. If he did not hear the warning, or if he was confused, and in that way ran into the wire unconsciously, not knowing it was there, he would not be guilty of contributory negligence. Upon all this evidence, you will determine whether he was prudent and cautious in crossing the street, and what knowledge he had of the danger he was going into. If he was not aware of this danger, and was using proper care, you will find upon that branch of the case in favor of the plaintiff."

The judge might well have added that the night was so dark that he could not see this little wire until he was close upon it; that at the time he was advised that the wire was down, in the early part of the evening, at another place, when the boys were playing with it, he expressed a wish that no one would get killed with it. The question of contributory negligence was plainly for the jury.

It is also contended by the appellant that the negligence of the city was not the proximate cause of the injury; that the wire, when it broke, only fell across the trolley wire, and did not reach down to the street, and it would not have come in contact with the deceased had not the railway company and employees pulled the wire down. There is no doubt but that the act of the employees was a concurring cause of the accident, but had not the line fallen from the trolley wire, having been disconnected from the pole for want of proper construction or want of due care on the part of the city, the accident would not have occurred, coming within the principle that, where an injury is the combined result of the negligence of the defendant and an accident for which neither the plaintiff nor the defendant is responsible, the defendant must pay damages, unless the injury would have happened had he not been negligent. Thomp. Neg. p. 1085, § 3; Quill *v.* Telegraph

Concurring Causes.

Co., 92 Hun, 546, 34 N. Y. Supp. 470, and 37 N. Y. Supp. 1149; Laible *v.* Railroad Co., 13 App. Div. 574, 43 N. Y. Supp. 1003. In the Quill case the plaintiff was injured by the fall of an insulator from the defendant's telephone pole. The insulator, although not properly secured, would not have fallen had it not been knocked off by a third person, for whose acts the defendant was not responsible; nor would the acts of such third person have knocked it off had it been securely attached. *Held*, that both the defective attachment of the insulator and the act of the third person were the proximate causes of the accident, and it might therefore be attributed to either or both of them.

The appellant complains of the charge of the court as follows:

Instructions.

"It was error to charge that the city of Rochester was bound to remove its wires to another place, and that it should have originally constructed it in a different place," evidently referring to the feeder bank line.

The counsel has misapprehended the charge of the court in that regard. The court said:

"Now, if you find that this was a dangerous place by reason of the proximity of the trees, or if for any other reason, in which to construct this patrol line, and that it could have been avoided without difficulty,—if the city could have constructed the line originally in another place, or if, after the trolley line had been constructed, it could have changed the line to another place without difficulty, it was bound to do so, if the place where it was constructed was dangerous to human life, and it could have been avoided without difficulty; and, if a line constructed on the feeder bank was practicable, the city was bound to use that, and avoid this danger. It is for you to say whether the falling of this wire upon the trolley wires was a danger that was to be apprehended, and if it was, and this danger could have been avoided, that should have been done."

At the close of the charge, the counsel for the defendant asked the court to charge that:

Note

"The city had the right to construct this line on Mount Hope avenue, and was only chargeable for negligence in the construction or maintenance of the same."

The court so charged, and, taking the two charges together, there was no error.

At the close of the evidence, the trial court dismissed the complaint as to the Rochester Railroad Company and the Rochester Gas & Electric Company, that were joined as defendants with the city of Rochester, and refused to dismiss as to the city. The counsel for the city, however, asked the court to let the case go to the jury as to the negligence of the other defendants, which was refused, and the exception to such refusal is urged here as a ground of reversal. This point is without merit.

Finally, the appellant claims that the damages were excessive. The verdict was $5,000. The statute permitted the jury to render a verdict up to that amount. The appellate court should only interfere with it where the amount is so excessive as to indicate passion or prejudice on the part of the jury, or greatly beyond any possible loss that could have come to the next of kin. It is unnecessary to review the cases upon this subject. We are of opinion that this point is not well taken. No exceptions are presented taken upon the trial upon the reception or rejection of evidence.

Damages.

We find no revisable error in the points presented by the appellant, and the judgment and order appealed from should be affirmed.

Judgment and order affirmed, with costs. All concur.

The court adopted this opinion at January term, 1899.

NOTE.

Concurrence of Accident and Negligence.—Where an accident and a want of ordinary care concur in producing an injury, the negligent person is liable for the consequences if, without his negligence, the injury would not have been caused by the accident.

Note

alone. This is upon the principle, applicable throughout the law of negligence, that where there are concurring causes of an injury, one of such causes being negligence, the negligent person cannot escape liability if, notwithstanding the other contributing causes, the injury or a part of the injury would not have occurred had the negligent person been in the exercise of ordinary care. Romney Marsh *v.* Trinity House Corp., L. R. 5 Exch. 204, L. R. 7 Exch. 247, 2 Thomp. on Neg. 1063; Salisbury *v.* Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Pollett *v.* Long, 56 N. Y. 200; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Phillips *v.* New York Cent., etc., R. Co., 127 N. Y. 657, 38 N. Y. St. Rep. 675; Durkin *v.* Sharp, 88 N. Y. 225; Searles *v.* Manhattan R. Co., 101 N. Y. 661; Seeley *v.* New York Cent., etc., R. Co., 102 N. Y. 719, 2 N. Y. St. Rep. 452; Grant *v.* Pennsylvania, etc., Canal, etc., Co., 133 N. Y. 657, 45 N. Y. St. Rep. 305.

In Salisbury *v.* Herchenroder, 106 Mass. 458, 8 Am. Rep. 354, it is said: "The fact that a natural cause contributes to produce an injury which could not have happened without the unlawful act of the defendant does not make the act so remote as to excuse him."

And the same principle has been stated thus: "We apprehend that the concurring negligence which, when combined with the act of God, produces the injury, must be such as is in itself a real producing cause of the injury, and not merely a fanciful or speculative or microscopic negligence which may not have been in the least degree the cause of the injury. In other words, if the act of God in this particular case was of such an overwhelming and destructive character as, by its own force, and independently of the particular negligence alleged or shown, produced the injury there would be no liability, though there were some negligence in the maintenance of the particular structure. To create liability it must have required the combined effect of the act of God and the concurring negligence to produce the injury." Baltimore, etc., R. Co. *v.* Sulphur Springs Independent School Dist., 96 Pa. St. 65, 42 Am. Rep. 529, 2 Am. & Eng. R. Cas. 166.

For further cases to the same point, see; Lambkin *v.* South Eastern R. Co., L. R. 5 App. 352; Dixon *v.* Metropolitan Board of Works, 7 Q. B. Div. 418; Ellet *v.* St. Louis, etc., R. Co., 76 Mo. 518, 12 Am. & Eng. R. Cas. 183; Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527; Baltimore, etc., R. Co. *v.* Sulphur Springs Independent School Dist., 96 Pa. St. 65, 42 Am. Rep. 529, 2 Am. & Eng. R. Cas. 166; Philadelphia, etc., R. Co. *v.* Anderson, 94 Pa. St. 356, 39 Am. Rep. 787, 6 Am. & Eng. R. Cas. 407; Davis *v.* Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590, 11 Am. & Eng. R. Cas. 173.

QUILL

v.

MAYOR, ETC., OF CITY OF NEW YORK.

(*Supreme Court of New York, Appellate Division, Jan. 31, 1899.*)

Personal Injuries—Sufficiency of Evidence.—In an action for personal injuries claimed to have been inflicted upon plaintiff by a garbage cart belonging to the street cleaning department, while plaintiff was seeking to board a street car, the car conductor testified that the cart was marked with the marks of such department, and identified the driver. The driver testified that he was in the employ of the department on the day in question, but denied the occurrence of the alleged accident. *Held*, that the evidence was sufficient to support the verdict for plaintiff.

Municipal Corporation—Liability for Negligence of Servants.*—The injury having resulted from the negligence of the driver, the city was liable, as the duty imposed by law upon the city to remove garbage, etc., from the streets is one imposed upon it in its *quasi* private corporate character, and not in its governmental capacity.

APPEAL by plaintiff from New York county trial term. *Reversed.*

Argued before GOODRICH, P. J., and CULLEN, BARTLETT, HATCH, and WOODWARD, JJ.

J. Campbell Thompson (*William P. Maloney*, on the brief), for appellant.

Theodore Connoly (*Terence Farley*, on the brief), for respondent.

CULLEN, J. This action was brought to recover for injuries claimed to have been inflicted upon the plaintiff by an ash and garbage cart belonging to the street-cleaning department of the defendant, which was being driven along Manhattan street. The jury rendered a verdict for the plaintiff for the sum of $500. The plaintiff was seeking to board a street car at the time

Personal Injuries—Sufficiency of Evidence.

*See note at end of case.

that she was struck by the cart. The conductor testified that the cart was marked with the marks of the department, and he identified the person who was driving the cart at the time. The driver of the cart testified that he was in the employ of the department on the day in question, though he denied that any accident such as claimed by the plaintiff had happened. The plaintiff was not concluded by the denial of the driver as to the occurrence of the accident. She might well ask the jury to believe his testimony that he was in the employ of the city at the time, and to disbelieve his statement that the cart had not struck her. The evidence was, therefore, sufficient to support the verdict of the jury, and the order appealed from can only be sustained on the ground that in the service which the driver of the cart was performing at the time the defendant was not liable for his acts.

Municipal Corporation—Liability for Negligence of Servants.

It cannot be expected, nor would it be profitable, that we should review from the earliest time the development of the law on the liability of municipal corporations for the torts of their servants or officers. The law on this subject is not the same in all the states, and it doubtless rests in many cases upon distinctions that are wholly artificial and on legal fictions. Nevertheless, the principles of such liability and the classes of cases in which the municipality will be held liable and those in which it will be held exempt from liability in this state are well settled by authority, and we may safely start in the present discussion with the case of Maximilian *v.* Mayor, etc., 62 N. Y. 160. There the court said:

"There are two kinds of duties which are imposed upon a municipal corporation: One is that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes."

In the first case the municipality is liable for the torts of its officers and servants; in the second not. Accordingly, it has been held that a municipal corporation is not liable for the acts of its police officers, its commissioners of charities, its board of education, its health authorities, and generally for officers engaged in such duties or such governmental functions as the state assumes to discharge throughout its whole territory. But the duties which the law considers as imposed on municipal corporations in their corporate character, and not as governmental in the broad sense, are not confined to those which relate to the private property of a municipality nor to undertakings from which it may receive pecuniary profit. In the old city of New York the title to the streets is in the city, though the city merely holds them as trustee for the general public. People *v.* Kerr, 27 N. Y. 188. But in the great majority of cases the municipal corporation has no property right whatever in the streets, the fee being in private individuals, and the easement of passage being in the people of the state. Still it is well settled that for failure of its duty to keep the streets and highways within its territory safe, a municipality is liable. Weet *v.* Village of Brockport, 16 N. Y. 161, *note*. The same is true of the sewers. Lloyd *v.* Mayor, etc., 5 N. Y. 369. From the maintenance of neither streets nor sewers does the city derive profit; on the contrary, they constitute a burden and expense. We are entirely willing to adopt the classification of municipal duties formulated by the learned counsel for the respondents:

"First, governmental duties, which have been delegated to the city or town by the people, acting through the legislature, and which, though performed within circumscribed territorial limits, serve to benefit the people of the state, and in the carrying out of which the municipal corporation is only an agent of the state; secondly, *quasi* private duties, to be exercised for the peculiar advantage of the municipal locality and its inhabitants, and exclusive of any benefit to

be conferred upon any person outside of the corporate jurisdiction."

The question, then, is presented, into which class does the duty imposed by law upon the city of New York to remove the dirt accumulating on the streets, and ashes and garbage from the abutting residences, fall? That duty is imposed by section 704 of chapter 269 of the laws of 1892, commonly called the "Consolidation Act": "And to remove from said city or otherwise dispose of, as often as the public health and use of the streets may require, all street sweepings, ashes and garbage and to remove the newly fallen snow from leading thoroughfares and such other streets and avenues as may be found practicable." The learned counsel for the respondents contends that this is a police regulation, imposed in the interest of public health; that it is governmental, as distinguished from municipal or corporate. The learned trial court upheld this claim so far as to the obligation of the city to remove snow, ashes, and garbage is involved, and held that, as the case failed to show in what particular work the driver and vehicle were employed,—whether that of cleaning the streets or of removing ashes,—the defendants were not liable. This ruling is in accordance with the decisions in Bishop *v.* City of New York, 21 Misc. Rep. 598, 48 N. Y. Supp. 141, and Davidson *v.* City of New York, 24 Misc. Rep. 560, 54 N. Y. Supp. 51. It has also the support of two cases in other states. In Love *v.* City of Atlanta, 95 Ga. 129, 22 S. E. 29, it was held that the removal of garbage from the street was the exercise of a purely governmental function, affecting the welfare of the citizens of the state generally; and that a municipal corporation was not liable for the acts of employees engaged in the discharge of such work. In Connelly *v.* Mayor, etc. (Tenn. Sup.) 46 S. W. 566, substantially the same doctrine of nonliability was held by the courts of Tennessee in the case of a watering cart engaged in sprinkling the streets. With the greatest deference to the learned courts by whom these decisions have been promulgated, we think they proceed on

a fundamental misconception of the duty discharged by the municipality. That the city is not liable for the action of its health authorities in the protection of public health, we concede to its fullest extent. But the work undertaken by the city in the cases cited is not at all part of the governmental work or duty of the state in protecting the health of its citizens. Boards of health—probably in all states; certainly in this—have the power to abate nuisances, and also to prevent the creation or occurrence of nuisances. But this work is not done, in the first instance, by the government, or at its expense. The duty of maintaining his premises free from nuisance rests primarily on the owner or occupant, and he must discharge it at his own cost. When he fails to do so, he is liable to indictment and punishment, and the nuisance can be abated. So far as we know, the expense of the abatement of a nuisance is imposed on the offender. The abatement of a nuisance is, doubtless, strictly a governmental work, and for the wrongs committed by public officers in such work the municipality would not be liable. But the work required of the citizen to prevent his property becoming a nuisance is in no sense governmental. Now, the duty or labor imposed on the city by the consolidation act as to the removal of garbage and ashes seems to us plainly not the governmental function of abating nuisances, but the private duty which would otherwise rest on residents and property owners within the municipality. The state, especially of late years, with advancing civilization, and with increase in the knowledge of hygiene, has in many respects raised the sanitary conditions and requirements in accordance with which it requires its citizens to live, but it has not assumed to furnish from the public funds the cost entailed by those sanitary rules with which it compels the citizen, by threatened penalties, to comply. The duty rests as much on the owner of a farm in Essex county to keep his premises free from any accumulation of garbage or refuse that would constitute a nuisance, or endanger public health, as it does upon the owner of a hotel fronting on Broadway. The state

does not assume to transport the garbage or ashes from the farm, nor to see to their deposit in a place where they would be innocuous. In fact, it is only within a few years that the municipalities have assumed this duty. I well remember when, in Brooklyn, all garbage, if not ashes, were taken away from the houses by contract between the property owner and private individuals engaged in the business. In a large part of the territory of Greater New York the same rule still prevails. It is within the last 40 years that any general system of sewers has been constructed and maintained in either the city of New York or Brooklyn, although prior to that time there were large sewers on particular streets. Before the construction of the sewers, privy vaults and cesspools were maintained on private property, and the duty rested on the owner to keep those vaults in such a condition as not to become a nuisance, or dangerous to health. The difficulty of private parties, where there is a large and dense population, in properly disposing of their sewage, led to the establishment of public sewers. But in reality it was a private duty, assumed by the municipality on account of the difficulty of the citizens individually properly discharging it. The same is equally true of the duty now assumed to remove ashes and garbage. As to ashes, they are in no sense a menace to health; they are used for filling in lots and lowlands all through the city. The burden of removing the ashes, if the owner does not wish them to remain longer on his property, is primarily just as much his personal obligation as it was to bring to his premises, in the first instance, the coal from the burning of which the ashes proceeded. As to the garbage, we do not see that it can be distinguished in principle from the case of the sewage. Both are occasioned by the acts of private persons, and on account of the restrictions imposed by urban life the city discharges the private duty of the members of the municipality which it has become difficult for those members to discharge themselves. The same is true of the furnishing of water to the residents. It was primarily a private enterprise.

Note

Originally, the burden of obtaining water for potable or other purposes rested on the persons desiring to use it, to the same extent as in the case of flour to make bread. In many places and in many cities to-day it is furnished by private capital. But here again the necessities of urban life, and the impossibility of getting water unless by a general supply from distant sources, has rendered it necessary for municipalities to enter upon the work of furnishing water to their residents. It seems to us that all these duties are strictly municipal. It is entirely probable that many other services that are performed by the citizen, each for his own benefit, will, on account of the great convenience and advantage, in the future be assumed by the municipal government. Indeed, the distinguishing feature that characterizes such services as municipal is that they are primarily the work of the individual citizens, not assumed by the government throughout the state at large, but rendered necessary to be performed by municipalities on account of the condition of life peculiar to such municipalities.

The order appealed from should be reversed, and judgment ordered on the verdict, with costs to the appellant. All concur.

NOTE.

Liability of City for Negligence of Agents.—The weight of authority does not bear out the ruling made by the court in the leading case. It seems generally conceded that the appointment by a municipal corporation of agents to act for the promotion of public health, and its action in establishing and conducting charitable and educational institutions is an exercise of its powers as one of the governing agencies of the state, to which these functions primarily belong, and, therefore, no liability attaches for the negligence or misfeasance of any officer, agent, and employee particularly connected therewith. Maximilian *v.* Mayor, etc., of New York, 62 N. Y. 161, 20 Am. Rep. 468; Donovan *v.* Board of Education, 85 N. Y. 117; Ham *v.* Mayor, etc., of New York, 70 N. Y. 460; Bamber *v.* Rochester, 63 How. (N. Y.) Pr. 103; Richmond *v.* Long, 17 Gratt. (Va.) 375; Haight *v.* Mayor, etc., of N. Y., 24 Fed. Rep. 93; Bryant *v.* St. Paul, 33 Minn. 289, 53 Am. Rep. 31; Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332; Bigelow *v.* Randolph, 14 Gray (Mass.) 541; McDonal *v.* Massachusetts General Hospital, 120 Mass. 432; Benton *v.* Trustees

Note

of City Hospital, 140 Mass. 13, 12 Am. & Eng. Corp. Cas. 625. 54 Am. Rep. 36; Summers *v.* Daviess Co., 103 Ind. 262; Ogg *v.* Lansing, 35 Iowa 495, 14 Am. Rep. 760; Lane *v.* Woodbury, 58 Iowa 462; Condict *v.* Jersey City, 46 N. J. L. 157; Mitchell *v.* Rockland, 52 Me. 118; Barbour *v.* Ellsworth, 67 Me. 294; Rudolphe *v.* New Orleans, 11 La. Ann. 242; Murtaugh *v.* St. Louis, 44 Mo. 480; Diehm *v.* Cincinnati, 25 Ohio St. 305; Finch *v.* Board of Education, 30 Ohio St. 37; Nixon *v.* Newport, 13 R. I. 67, 43 Am. Rep. 35; Beach *v.* Leahy, 11 Kan. 23; Boyd *v.* Insurance Patrol, 113 Pa. St. 269; Sherbourne *v.* Yuba Co., 21 Cal. 113, 81 Am. Dec. 151. So in Curran *v.* Boston, 151 Mass. 505, 30 Am. & Eng. Corp. Cas. 506, it was held that a city in erecting and maintaining a work house performs a strictly public duty of no pecuniary advantage to such city, and although the maintenance of such work house is voluntary and the city derives some revenue therefrom, it cannot be held liable for an injury resulting to an inmate through the negligence of the officers and servants in charge. Especially is this so where the inspection and government of such work house is placed in the hands of a board of directors of public institutions, chosen by the city council, but not acting as the agent of the city.

A city, to improve its sanitary condition, collected and deposited in one place all the carcasses, garbage, etc., and buried them there. *Held*, that it was not liable to an individual for sickness produced thereby. Fort Worth *v.* Crawford, 64 Tex. 202. 53 Am. Rep. 753.

A libel to recover damages against a city for a collision between a schooner and a steamboat owned by the municipality, but in the exclusive use and control of the commissioners of charities and correction, and while navigated by a pilot employed by the commissioners, cannot be sustained, though the collision was solely through the fault of the pilot of the steamboat. Haight *v.* Mayor, etc., of N. Y., 24 Fed. Rep. 93.

A city is not liable for the acts or negligence of a board of health, constituted as a separate body by the charter of the city, the duties of such board of health being public and governmental and not corporate in their character. Bryant *v.* St. Paul, 33 Minn. 289, 8 Am. & Eng. Corp. Cas. 340, 53 Am. Rep. 31.

But when, by statute, it is made the duty of the department of docks of a city to keep a wharf belonging to the city in repair, although the use of the dock is solely for the benefit of the department for charities and corrections, and, like all other property appropriated to the use of that department, is in its general custody and keeping, the city is liable for damages caused to a vessel rightfully using the dock, by the failure of the department of docks, as its agent, to keep such dock in repair. Philadelphia, etc., R. Co. *v.* Mayor, etc., of New York, 27 Am. & Eng. Corp. Cas. 9.

BARTLETT

v.

TOWN OF CLARKSBURG.

(*Supreme Court of Appeals of West Virginia, Nov. 30, 1898.*)

Personal Injuries—Fireworks—Consent of Officers—Liability.*—An incorporated town is not liable for personal injuries occasioned by the firing of squibs, rockets, fireworks, and firearms on the streets by a crowd of citizens, although such acts be done with the knowledge and consent of the mayor, council, police, and other officers of such corporation.

Liability for Negligence of Officers.*—As to the powers and functions of an incorporated town of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein.

(Syllabus by the Court.)

ERROR by plaintiff to Harrison county circuit court. *Affirmed.*

W. Scott, for plaintiff in error.

John Bassel and *M. M. Thompson*, for defendant in error.

MCWHORTER, J. R. B. Bartlett brought his action on the case in the circuit court of Harrison county to recover damages against the town of Clarksburg for personal injuries sustained by plaintiff by reason of the discharge by private persons of firearms, squibs, rockets, and fireworks at a narrow place in one of the streets of said town, on the ground that the said fireworks were discharged by the consent and written permission of the mayor, and with the knowledge and consent of the council and police and other officers of said town, and that the said discharge of firearms, fireworks, etc., was of such a nature as to be a public nuisance, whereby the team of horses of plaintiff attached to

Case Stated.

*See note at end of case.

his buggy became frightened and unmanageable, and beyond the control of plaintiff, and ran away, throwing plaintiff from his buggy seat, and badly injuring him, for which injuries plaintiff alleges said town is liable to him for damages. The declaration contains two counts. Defendant demurred to the declaration and each count, which being argued and considered, the court sustained said demurrers; and, plaintiff not desiring to amend his declaration, the same was dismissed, and judgment rendered in favor of defendant for costs. No ground of demurrer is contended for, except that the town is not liable, and that an action cannot be maintained against the town for the wrong complained of. The appellant cites Speir *v.* City of Brooklyn, 139 N. Y. 6, 34 N. E. 727, which is, as he claims, on all fours with the case at bar, where it is held that "a city is liable for injury to property by an explosion of fireworks constituting a dangerous public nuisance, when the display was made under a permit given by the mayor of the city acting under authority of a city ordinance." In the case under consideration, it is not alleged in the declaration that the written permit was granted by the mayor acting by virtue or under authority of an ordinance of the town. This is about the only particular in which the two cases differ. In Speir *v.* City of Brooklyn the judge says: "It is the settled doctrine of the courts that a municipality is not bound merely by the assent of its executive officers to wrongful acts of third persons; nor could the mayor bind the city by a permit for the granting of which he had no color of authority from the common council, and which was not within the general scope of his authority." The case of Speir *v.* City of Brooklyn is supported by some other authorities; and I confess I am largely in sympathy with the decision in that case, and agree with JUDGE OKEY as to the nuisance in the case of Robinson *v.* Greenville, 42 Ohio St. 630, where he says: "That firing of cannon in a public street of a municipal corporation, except in case of imperative and urgent necessity, is an intolerable nuisance, and that all persons engaged in

Personal Injuries—Fireworks—Consent of Officers—Liability.

such unlawful act are personally liable for all damages caused thereby, are propositions concerning which there is no room for difference of opinion. But a very different question is presented when it is attempted to fasten liability for such injuries on a municipal corporation."

In the case at bar the acts complained of are equally as great a nuisance as the firing of cannon, as stated in above case. Appellee contends that "the law in this state has been settled in at least two cases upon all fours with this case," *viz.* Mendel *v.* City of Wheeling, 28 W. Va. 233, and Brown's Adm'r *v.* Town of Guyandotte, 34 W. Va. 299, 12 S. E. 707. Cooley on Torts (pages 738, 739) says: "Municipal corporations are to be considered—First, as parts of the governmental machinery of the state, legislating for their coporations, and planning and providing for the customary local conveniences of their people; second, as corporate bodies, through proper agencies putting into execution their plans, and discharging such duties as they have imposed upon themselves, or as the state has imposed upon them; and, third, as artificial persons owning and managing property. In the last capacity they are chargeable with all the duties and obligations of other owners of property, and must respond for creating or suffering nuisances, under the same rules which govern the responsibility of natural persons. * * * For taking or neglecting to take strictly governmental action, municipal corporations are under no responsibility whatever, except the political responsibility to their corporations and to the state. The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised within prescribed limits, at discretion for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries. Therefore one shows no ground of action whatever when he complains that he has suffered damages because the city he resides in has made insufficient provision for protection

against fire, or because cattle are not prohibited from running at large, or because coasting in the highways is not prevented, or because the operation of an ordinance which prohibits the explosion of fireworks in the city is temporarily suspended, or because provision is not made for lighting the streets. * * * Neither is a municipal corporation responsible for the failure of its officers to discharge properly and effectively their official duties; for in respect to these the officers are not properly the servants or agents of the corporation, but act upon their own official responsibility, except as they may be especially directed by the corporate authority." In Robinson *v.* Greenville, *supra* (Syl. point 4): "An assemblage of disorderly persons, after having been engaged for several hours in discharging a cannon in a public street of a municipal corporation, seriously injured a resident of the corporation, himself without fault, by one of such discharges. Held, that such corporation is not liable for the injury, although the statute provides that the council shall have the care, supervision, and control of the streets, 'and shall cause the same to be kept open and in repair, and free from nuisance' (Rev. St. Ohio, § 2640); and it will make no difference that the authorities of such corporations, with knowledge of such firing, took no steps to prevent the same." Also Borough of Norristown *v.* Fitzpatrick, 94 Pa. St. 121 (Syl. points 1 and 2): "(1) N. was injured, while crossing a street in a borough, by the firing of a cannon by a crowd of citizens. In an action against the borough to recover damages for the injury, the jury, in a special verdict, found that the cannon had been fired at short intervals for several hours, at various points in the borough; that it was not fired at any public or authorized celebration; that a policeman was standing by, and made no effort to stop the firing. A special act of assembly authorized the borough to appoint policemen, remove nuisances, etc. Held, that the borough was not liable. (2) Admitting that such an assemblage was a nuisance, and that of the worst kind, it is one that a municipal corporation cannot abate by the use of ordinary appliances,

such as suffice for the removal of natural or material obstructions in or near a highway, and resort therefor must be had to the police; but for the doings or misdoings of those who compose this force the municipality is not liable." Campbell's Adm'x *v.*City Council, 53 Ala. 527. "The city is not liable for injuries resulting from violence, which the police, by diligent discharge of duty, might have prevented. Although appointed by the city, the police are *quasi* civil officers, for whose misfeasance or nonfeasance in office the city is not responsible, though they are personally answerable." City of La Fayette *v.* Timberlake, 88 Ind. 330: "A municipal corporation is not liable for a personal injury occasioned on its streets by persons making an unlawful use of its streets, as by coasting. A municipal corporation is not liable for failure to exercise governmental powers, as for failure to enforce the state laws or its own ordinances. A municipal corporation is not liable for the negligence of its police officers. They are not its agents, but public officers." Faulkner *v.* City of Aurora, 85 Ind. 130: "A city, after having adopted an ordinance prohibiting, upon its streets, sports tending to produce personal injury, is not liable for a collision occurring upon a street, whereby a traveler was injured, as the result of coasting for sport, though the sport was carried on by crowds, publicly, in the presence of its officers and police, to the obvious danger of persons using the streets." Ball *v.* Town of Woodbine, 61 Iowa, 83, 15 N. W. 846: "Where fireworks are discharged within the limits of an incorporated town, in violation of the ordinances of the town, whereby one is injured, the town is not liable for such injury, notwithstanding the town council and officers of the town and a majority of the citizens actively participate in the discharge of the fireworks, and the town, by its officers, makes no attempt to stop the proceedings." Hill *v.* City of Charlotte, 72 N. C. 65: "A municipal corporation having power, under its charter, to make ordinances for the safety of its property in the city, suspended

Note

for a short time the operation of an ordinance forbidding the use of fireworks within the city. During such time, plaintiff's building was set on fire, and destroyed, by fireworks negligently used by boys. Held, that the corporation was not liable for such destruction." Dill. Mun. Corp. § 753: "A municipal corporation is not liable to an action for damages, either for the nonexercise of, or for the manner in which, in good faith, it exercises, discretionary powers of a public or legislative character." Wheeler *v.* City of Cincinnati, 19 Ohio St. 19; Forsyth *v.* Mayor, etc., 45 Ga. 152; Fisher *v.* City of Boston, 104 Mass. 87.

Authorities might be multiplied indefinitely. While the decisions are not all on one side, yet the great weight of the authorities, including those of our own state, is with the action of the circuit court in this case. In Brown's Adm'r *v.* Town of Guyandotte, 34 W. Va. 299, 12 S. E. 707 (Syl. point 1), it is held that, "as to the powers and functions of a town of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein." Mendal *v.* City of Wheeling, 28 W. Va. 233. The judgment will have to be affirmed.

Liability for Negligence of Officers.

NOTE.

Injuries Caused by Fireworks—Liability of Municipality.—A town is not liable for an injury caused by fireworks discharged by citizens, in violation of an ordinance, even though the council and officers took an active part in the celebration. Ball *v.* Woodbine, 61 Iowa, 83, 6 Am. & Eng. Corp. Cas. 29, 47 Am. Rep. 805; Cumberland *v.* Willison, 50 Md. 128. In O'Rourke *v.* City of Sioux Falls, (S. Dak.), 44 Am. & Eng. Corp. Cas. 294, it was held that the fact that a cannon is placed in one of the public streets of a city and there fired, in violation of an ordinance, whereby one is injured, does not make the city liable for such injury, although it was known to the officers of such city that the cannon was to be fired, and they took no steps to prevent it.

The celebration of a holiday, when undertaken by a city exclu-

Note

sively for the gratuitous amusement or instruction of the public, under the authority of a general law applicable to all cities alike, does not render the city liable to an action by an individual who has sustained a personal injury through the negligence of the officers, servants or agents of the city in carrying out the celebration. Tindley *v.* City of Salem, (Mass.), 6 Am. & Eng. Corp. Cas. 22.

In Borough of Norristown *v.* Fitzpatrick, 8 Week. (N. C.) 459, 23 Am. & Eng. Corp. Cas. 117, *abstr.*, A was injured while crossing a street in a borough by the firing of a cannon by a crowd of men. The jury found in a special verdict that the firing had been going on for some hours, without any special authorization from the borough's authorities, and that a policeman standing by at the time did not interfere to stop it. The borough was specially directed, by act of assembly, to appoint policemen to preserve the public peace, remove nuisances, etc. In an action by A. to recover damages for said injuries, *held* that the borough was not liable. The court said: "The difference between those cases in which cities, boroughs, and townships have been held responsible for neglect and the one in hand is very wide; the maintenance and repair of highways, sewers, wharves, etc., belong to their immediate jurisdiction, and over them they alone have control: hence their responsibility. But the preservation of the peace is a great public duty, put by the commonwealth into the hands of public officers—the judges, justices of the peace, and mayors, the governors, sheriffs, constables, and policemen; hence cities and boroughs can no more be charged with damages resulting from their misconduct than can counties, townships, or the state at large."

Nor can a city which has an ordinance prohibiting the firing of gunpowder, but allowing the mayor to license such firing on certain occasions, be held liable for damage occasioned by the negligence of the licensees. Wheeler *v.* City of Plymouth (Ind.), 18 N. E. Rep. 532; Hill *v.* Charlotte, 72 N. Car. 55, 21 Am. Rep. 451.

But see, *contra*, Speir *v.* City of Brooklyn, 139 N. Y. 6, 44 Am. & Eng. Corp. Cas. 577. In this case it appeared that an ordinance of a city, after prohibiting the explosion of fireworks within the city limits, provided that this should not be construed as extending to fireworks exhibited by one authorized by a permit from the mayor to exhibit the same. Assuming to act under this ordinance, under which the mayor had been accustomed without question to grant permits to private persons to use the streets for the discharge of fireworks, the mayor issued a permit to an individual to discharge fireworks at the junction of two narrow streets which were completely built upon. A copy of the permit

was sent to the mayor's office and to the chief of police, and the police made no interference. The display was extensive, large and powerful rockets being used. One of these entered the plaintiff's window and set his house on fire. *Held*, in an action to recover damages from the city, that the discharge of the rockets was a public nuisance, and that the city was liable.

CITY OF CIRCLEVILLE

v.

SOHN.

(*Supreme Court of Ohio, Dec. 13, 1898.*)

Public Ways—Defects—Liability of Municipal Corporations.*—The duty, enjoined by statute on municipal corporations, to keep their public ways open, in repair, and free from nuisance, is ministerial and mandatory, and requires the removal from such ways of all dangerous defects and obstructions, from whatever cause arising, when brought to the notice of the corporation.

Same—Same—Same.—The corporation is liable for injuries caused by a dangerous defect or obstruction in a street or sidewalk under its control, after reasonable notice of its unsafe condition, though it arose from the construction or alteration of the street or sidewalk in conformity with a plan adopted by the municipal authorities.

SHAUCK, J., dissenting.

(Syllabus by the Court.)

ERROR by defendant to Pickaway county circuit court. *Affirmed.*

Case Stated.

The petition alleges "that the defendant, the city of Circleville, Ohio, is a municipal corporation of the fourth grade of the second class, duly organized under the laws of the state of Ohio; that there is a certain street in said city, called 'Court Street,' with sidewalks on both sides of the same, which have been constructed and maintained, upon grades established by said defendant, for the use of public travel by pedestrians having occasion to travel thereon; that the said street is, and was at the date

*See notes at end of case.

hereinafter mentioned, one of the most public streets in the said city, and that the said sidewalk, at the points hereinafter named, was a greatly frequented place, and much traveled by the general public, being within two squares of the business center of said city; that on the west side of said street, between Mound and Union streets, there is an alley, called 'South Boundary Alley,' extending from Canal street, and intersecting said Court street at a point between the lots of G. F. Wittich and Dorothea Turney; that, from a point near St. Philip's Episcopal Church to the said Court street, said alley descends and slopes rapidly, and where the same crosses said sidewalk it has a slope of at least 2 feet in 16 feet, thereby making said slope dangerous for persons traveling thereon, in times when the same is covered with ice and snow; that said sidewalk at said point, crossing said alley, is constructed in a dangerous and defective manner, by reason of said unusual abrupt slope, and having rough and uneven stones thereon, and between which there are large fissures; that the same is so constructed at said point as to have a depression or gutter in the middle, for the purpose of permitting and allowing drainage on and through said alley, from said Episcopal Church, and from lots adjoining on said alley, and over said sidewalk, and emptying into a gutter running along the said Court street, between the said sidewalk and the street proper; that in times of rainfall there is a large flow of water over and through said alley at said point, and in times of freezing the said sidewalk at said point becomes covered with ice from said drainage, and also from the drainage from lots adjoining on both sides of said alley, thereby making said sidewalk, from all said causes aforesaid, unusually dangerous to persons walking thereon; that said alley and said sidewalk have remained in said condition, as to the construction thereof, for a great many years, to wit, for at least 10 years, with the full knowledge of the defendant of all the conditions aforesaid; that accidents have frequently happened at said point, to persons walking on said sidewalk, by said persons slipping

and falling, when the same was covered with ice and snow; that the said G. F. Wittich and the said Dorothea Turney have, with the knowledge and consent of said defendant, for a long time prior to the injury hereinafter alleged, to wit, for at least 10 years prior thereto, and at the time said injury occurred, used said alleyway as a means of drainage for their slops and surplus water, coming from their said premises, and the same has been allowed and permitted by the defendant to flow over and across said sidewalk, and into said gutter, continuously, for the said period of time aforesaid; that on or about the 16th day of March, A. D. 1895, and for more than a month next preceding, said defendant, with full knowledge of all the facts heretofore stated, had carelessly and negligently suffered ice, frozen snow, and sleet to accumulate on said sidewalk at said point, and the same was at said date dangerous to persons passing along the same, by reason of its slippery condition, and the defective condition of said sidewalk, as hereinbefore stated; that at said date aforesaid, about 8 o'clock in the evening, this plaintiff was passing along the sidewalk, in the usual way, using all due care, and ignorant of its defective and dangerous and slippery condition, and while so walking she fell, and broke, fractured, and sprained her right limb near the ankle joint, and ruptured the ligaments, and otherwise injured her said limb; that by reason of the injury aforesaid she was laid up and confined to her bed for the period of five days, and has suffered great bodily pain and mental anguish, and was prevented for the last three months from attending to her business, and incurred about $125 expense for medical attendance and nursing, in attempting to be cured of said injuries; and this plaintiff further avers that she is still lame and crippled from said injuries, and is only able to attend to her business by the use of her crutches, that the said injuries still exist, and that she will, as she verily believes, be and remain permanently lame, crippled, and disabled from said injuries."

By an amendment the following allegations were added to the petition: "That in consequence of the defective con-

dition of the said alley, where the same crossed the said sidewalk, as it was at the time of her said injury, as described in her petition, and of the said unusual, abrupt, and dangerous slope thereof at said point, and of the accumulation and flow of the water over and through said alley and across said sidewalk, from the sources and causes as averred and described in her petition, and the freezing of the said ice and snow thereon, in the defective condition of the said sidewalk at said point, at the time of said injury, so caused and brought about by the negligence of said defendant, and by the negligence of the said defendant in permitting the same to be and remain in said condition, the said plaintiff became and was injured, as described in her petition."

The defendant answered, denying, substantially, the alleged defective condition of the sidewalk, and all negligence on its part, and charging the plaintiff with contributory negligence. The plaintiff controverted the allegations of contributory negligence, and upon a trial of the issues thus joined the defendant prevailed. The judgment in its favor was reversed by the circuit court, for error in the charge, and in refusing to give instructions requested by the plaintiff.

The charges so held erroneous are as follows: "If you find, from the evidence, that the plaintiff's fall was caused by the plan or design of the sidewalk, then the defendant cannot be held liable." "If you find, from the evidence, that the plaintiff's fall was caused by the plan or design of the sidewalk, and not by any failure to repair the same, or a defect in its construction after the plan was adopted, then the defendant cannot be held liable." "The city had a right to open out the alley, and to construct said sidewalk, and the alley crossing which intersects it at that point; and if you find, from the testimony, that the alley crossing complained of was constructed in a reasonably safe manner, according to a plan enacted by the city council of the city of Circleville, and that it has remained substantially in that condition since, and was so at the time the injury complained of took

place, and that the defect, if any, was in the plan, and not in its construction, or the want of repair on the part of the city, but that the injury complained of occurred and was caused by the adoption of a plan which, I have stated before, was reasonably carried out, and substantially built according to the plan, then and in that case the plaintiff cannot recover."

The instructions requested and refused are as follows: "If you find, from the evidence, that the accumulation of ice on the pavement, where the same crossed over South Boundary alley, combined with the defective condition of said alley at said point, and that the municipal authorities knew, or should have known, of its defective condition, then and in such case I charge you that the city is liable, unless you find that the plaintiff was guilty of contributory negligence in going upon said pavement at this point." "The duties of the municipal authorities of this state to keep the streets, alleys, and sidewalks of the municipality for which they act in repair are ministerial, and not legislative; and, although they may exercise their discretion as to whether such improvements shall be made, yet, when they do decide to make them, the law requires that they shall be made in a reasonably safe condition for public travel, and, in their acts in constructing the streets,alleys,and sidewalks in such a manner as to be reasonably safe for public travel, the municipality for which they act may be held liable." "The law of this state imposes upon the municipal authorities the duty of making and keeping the sidewalks of the municipality in reasonably safe condition for persons walking along and over them, and in the performance of this duty the authorities act in a ministerial capacity, and for their negligence in the performance of their duty the municipality for which they act may be held liable." "The same duty was imposed upon the defendant, through its municipal authorities, to make and keep in a reasonably safe condition the sidewalk where it crossed over South Boundary alley, as the other parts of said pavement."

The case is brought here on error by the city.

City of Circleville *v.* Sohn

WILLIAMS, J. (after stating the facts). The instructions given and refused by the court of common pleas, for which its judgment was reversed by the circuit court, raise the question whether a municipal corporation is exonerated from liability for injuries caused by an unsafe condition of a public way under its control, which it has suffered to remain after notice, when the defect arose in the execution of a plan adopted by the corporation for a local improvement. Its immunity from liability is defended here on the ground that, in the adoption of plans for local improvements, municipal bodies are in the exercise either of a legislative power, which is discretionary and not subject to judicial control, or of a judicial power, and not responsible for errors of judgment. Cases are cited in support of the proposition, some of which place the exemption from liability on one of these grounds, and some on the other, but none on both. It is said in Detroit *v.* Beckman, 34 Mich. 125, that "when complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, it is apparent that the fault is with legislative action." And in Urquhart *v.* City of Ogdensburg, 91 N. Y. 67, it is declared that the exercise of the power to make local improvements is *quasi* judicial. The courts of these states, in numerous decisions, maintain respectively these divergent views of the grounds on which municipal corporations are not liable in such cases, but concur in holding their nonliability; and on that question they are at variance with a large number of reported cases, especially of those decided by the courts of the Middle and Western States. In Blyhl *v.* Village of Waterville, 57 Minn. 115, 58 N. W. 817, it is held that "a municipal corporation is liable for an injury caused by having an unsafe sidewalk, the condition of which is due to the plan adopted for its construction,when the city could have remedied the defect, but did not do so." And in Gould *v.* City of Topeka, 32 Kan. 485, 4 Pac. 822, the court hold that a "city has no more right to plan or create an unsafe and dangerous condition of one of its streets than it has to plan or create a pub-

lic or common nuisance." The same doctrine is maintained in Indiana, Iowa, and other states.

We will not attempt a review or discussion of the cases on this subject. In their briefs, which show diligent research, counsel have collected the cases on both sides, and ably presented their different views. Text writers on the subject lean to the side of municipal liability in such cases. In Dillon on Municipal Corporations (volume 2, p. 1294), under section 1024, it is said: "Does the principle that actionable negligence cannot be predicated of the plan itself (*Id.* § 1046) go so far as to exempt from liability if that plan leaves the streets in an unsafe and dangerous condition for public use? In the author's opinion this question ought to be answered in the negative." And in Harris on Damages by Corporations (volume 1, p. 165) that author says: "As to the liability of a city for damages for an injury resulting from a defective plan, the decisions are not all harmonious, but the weight of authority is now, perhaps, in favor of holding the city liable for defects in the plan as well as in the execution of the work." And see Elliott, Roads & S. c. 20, and Jones, Neg. Mun. Corp. c. 4, p. 67. It has been held in this state, in a number of reported cases, that municipal corporations are liable for injuries caused to property abutting on streets, by changes in their grades, notwithstanding the establishment of the grade was a lawful exercise of municipal authority, and the work was done in conformity with the plan so adopted. The court recognizes that in this class of cases it has taken ground in advance of some adjudications elsewhere, and its position is maintained on principle. The doctrine established by them has since been adopted and followed in several other states.

In City of Dayton *v.* Pease, 4 Ohio St. 80, the city of Dayton was held liable in damages for injuries to property resulting from the fall of a bridge, forming part of one of its streets over a canal, where the fall was owing entirely to defects in the plan of the bridge, which had been approved by the council, and the bridge was constructed under its

direction and in accordance with the plan. While the question here is not precisely the same as in that case, it is nearly so, and involves an application of the same principle. And, in view of the irreconcilable conflict of decisions elsewhere on this question, we are at liberty to adopt such rule as will best harmonize with those of this court and our legislation on the subject, and as to us seems most reasonable and practicable. Our statute in express terms places the public ways of each municipality in its control, coupled with a positive command to keep them open, in repair, and free from nuisances. In the performance of that duty the municipal authorities are required to remove and keep removed from its streets all dangerous defects, obstructions, and nuisances of every kind, as they may arise from time to time, from any cause. There is no exception from the requirement in favor of defects, obstructions, or nuisances which are placed, or caused to be placed, in a street, by the corporation, or by its officers or agents; nor is there any the less reason for holding the corporation liable for a disregard of its duty to remove such obstacles from its streets, when placed there by its own act or the act of its officers, than there is for making it answerable for its negligence in permitting similar obstacles to remain when placed in the street by other persons. The statutory duty is ministerial in its nature and mandatory in terms, and was imposed for the benefit of those having occasion to use the streets, so that they might use them with safety, and not for the benefit of the corporation, and ample means for its prompt and efficient performance are placed in the control of the corporation. While municipal legislation may be necessary in providing means and measures for the performance of the duty, as it is with respect to many strictly ministerial duties, its performance, or the omission to perform it, is not the exercise of legislative or judicial power; nor is it discretionary.

Public Ways—Defects—Liability of Municipal Corporations.

We are of opinion, therefore, that a municipal corporation should be held liable for injuries caused by a dangerous

defect or obstruction in a street or sidewalk, which it suffers to remain after reasonable notice of its existence, though it arose in the construction or alteration of the street or sidewalk in accordance with a plan adopted by the municipal authorities. We express no opinion in regard to the weight of the evidence. There was not a total lack of evidence tending to support the issues for the plaintiff, and its sufficiency is for the jury under proper instructions, and for the lower courts. Judgment affirmed.

Same—Same—Same.

SHAUCK, J., dissents.

NOTES.

Defective Streets—Liability of Municipality.—Cities are not insurers of the safety of their streets; but they must use reasonable care to keep them in a safe condition for travel in the ordinary modes by day and by night, and for the negligent failure so to do they are liable to one who, while so traveling and exercising reasonable care, is injured by reason of their negligence. Indianapolis *v.* Cook, 99 Ind. 15, 7 Am. & Eng. Corp. Cas. 81; Centerville *v.* Woods, 57 Ind. 192; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Macomber *v.* Taunton, 100 Mass. 255; Raymond *v.* Lowell, 6 Cush. (Mass.) 524; Furnell *v.* St. Paul, 20 Minn. 117; Blake *v.* St. Louis, 40 Mo. 571; Aurora *v.* Pulfer, 56 Ill. 270; Emporia *v.* Schmidling, 33 Kan. 485, 7 Am. & Eng. Corp. Cas. 86; Atchison *v.* Jansen, 21 Kan. 560; Massey *v.* Mayor, etc., of Columbus, 75 Ga. 658; McCarthy *v.* Syracuse, 46 N. Y. 194; Hunt *v.* Mayor, etc., of N. Y., 109 N. Y. 134, 20 Am. & Eng. Corp. Cas. 380; Turner *v.* Newburgh, 109 N. Y. 301; Richmond *v.* Courtney, 32 Gratt. (Va.) 792; Seward *v.* Milford, 21 Wis. 485; Atchison *v.* Jansen, 21 Kan. 560; Leicester *v.* Pittsford, 6 Vt. 245; Johnson *v.* Haverhill, 35 N. H. 74; Williams *v.* Clinton, 28 Conn. 264; Manderschid *v.* Dubuque, 29 Iowa 73, 4 Am. Rep. 196; Michigan City *v.* Boeckling, 122 Ind. 40; Warsaw *v.* Dunlap, 112 Ind. 576, 18 Am. & Eng. Corp. Cas. 263; Selma *v.* Perkins, 68 Ala. 145; Wilson *v.* Wheeling, 19 W. Va. 324, 42 Am. Rep. 780; Lincoln *v.* Gillian, 18 Neb. 114; Easton *v.* Neff, 102 Pa. St. 474, 43 Am. Rep. 213; Denver *v.* Deane, 10 Colo. 375, 20 Am. & Eng. Corp. Cas. 336, 3 Am. St. Rep. 594; Yearance *v.* Salt Lake City (Utah), 31 Am. & Eng. Corp. Cas. 10, and *note*.

Notes

Same—Same—Ice and Snow.—Where a street or sidewalk is properly constructed, the mere fact that it is rendered slippery by ice or snow will not, ordinarily, make the city liable, if the ice or snow is not suffered to accumulate or remain in such a rounded or uneven condition as to constitute an obstruction or a defect. Stanton *v.* Springfield, 12 Allen (Mass.) 566; Keith *v.* Brockton, 136 Mass. 119; Nason *v.* Boston, 14 Allen (Mass.) 508; Stone *v.* Hubbardston, 100 Mass. 50; Cook *v.* Milwaukee, 24 Wis. 270, 1 Am. Rep. 183; Chicago *v.* McGiven, 78 Ill. 347; Gibson *v.* Johnson, 4 Ill. App. 288; Broburg *v.* Des Moines, 63 Iowa 523, 4 Am. & Eng. Corp. Cas. 627, 50 Am. Rep. 756; Taylor *v.* Yonkers, 105 N. Y. 202, 18 Am. & Eng. Corp. Cas. 266, 59 Am. Rep. 492; Kinney *v.* Troy, 108 N. Y. 567; Evans *v.* Utica, 69 N. Y. 166, 25 Am. Rep. 165; Harrington *v.* Buffalo, 121 N. Y. 147; Smythe *v.* Bangor, 72 Me. 249; Henkes *v.* Minneapolis, 42 Minn. 530; Mauch Chunk *v.* Kline, 100 Pa. St. 119, 45 Am. Rep. 364; Seeley *v.* Litchfield, 49 Conn. 134, 44 Am. Rep. 216; Chase *v.* Cleveland, 44 Ohio St. 505, 38 Am. Rep. 543; Grossenbach *v.* Milwaukee, 65 Wis. 31, 11 Am. & Eng. Corp. Cas. 551, 56 Am. Rep. 614; Ringland *v.* Toronto, 23 U. C. C. P. 93; Bleakely *v.* Prescott, 12 Ont. App. Rep. 637, 15 Am. & Eng. Corp. Cas. 227. *Compare* Cloughessey *v.* Waterbury, 51 Conn. 405, 7 Am. & Eng. Corp. Cas. 65, 50 Am. Rep. 38; Tripp *v.* Lyman, 37 Me. 250; Chicago *v.* Hislop, 61 Ill. 86.

Where there is a defect in the construction of the sidewalk and an injury has been occasioned partly by such defect and partly by the slippery condition of the walk caused by snow and ice, the city will, if there is no contributory negligence, generally be held liable. Gillrie *v.* Lockport, 122 N. Y. 403; Atchison *v.* King, 9 Kan. 550; Hampson *v.* Taylor, 15 R. I. 83; Adams *v.* Chicopee, 147 Mass. 440, 25 Am. & Eng. Corp. Cas. 60; Haskell *v.* Des Moines, 74 Iowa 110; Lincoln *v.* Smith, 28 Neb. 762. See also Gaylord *v.* New Britain, 58 Conn. 398, 31 Am. & Eng. Corp. Cas. 51 and *note;* Mauch Chunk *v.* Kline, 100 Pa. St. 119, 45 Am. Rep. 364.

But it does not always follow that liability attaches merely because there is a defect and snow has fallen or ice formed upon the walk. Taylor *v.* Yonkers, 105 N. Y. 202, 18 Am. & Eng. Corp. Cas. 266, 59 Am. Rep. 492; Muller *v.* Newburgh, 32 Hun (N. Y.) 24; Slavin *v.* Mayor, etc., of N. Y., 56 N. Y. Super. Ct. 604.

TOWN OF WILLIAMSPORT

v.

LISK.

(*Appellate Court of Indiana, Jan. 11, 1899.*)

Personal Injuries—Defective Sidewalk—Liability.*—Incorporated towns are liable for injuries resulting from defective sidewalks.

Same—Same—Knowledge of Defect.—A person is not necessarily precluded from recovering for such injuries because he had knowledge of the defect from which they resulted, prior to the accident.

Conflicting Evidence—Review.—In an action for such injuries, where the evidence is conflicting, and no findings of fact are returned with the general verdict, such verdict will not be disturbed on appeal.

APPEAL by defendant from Warren county circuit court. *Affirmed.*

Stansbury & Stephens, for appellant.

W. L. Raburn and *J. W. Sutton*, for appellee.

HENLEY, J. This action was commenced by the appellee against the appellant to recover damages on account of an alleged injury received by her in falling upon a sidewalk in the town of Williamsport, it being alleged that the sidewalk at the time and place the injury occurred was in a defective and dangerous condition. It is alleged in the complaint that the place where appellee fell was on the east side of Monroe street, near the corner of the brick block, which had been erected only a short time prior to the accident. In erecting the building, and in constructing concrete walks around it, it was necessary to cut down the grade of the old sidewalk about 23 inches below the surface of the old walk, in order to conform to the grade of the new walk. By doing this there was left near the end of the new walk an abrupt incline or step of some 25 inches in depth.

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*See City of Circleville *v.* Sohn (Ohio), *ante*, and *notes*.

This was left for a time by the appellant in that condition, except that boards were laid there, so that pedestrians could more easily pass over the sidewalk, and afterwards, on account of the town board having failed to let the contract for the permanent improvement of the street, the marshal of the town, by order of the town board, repaired the walk by cuting down the grade some 9 or 10 feet; making the walk an inclined plane, the upper end of which was about 25 inches higher than the lower end, and 5 feet wide. This was the condition of the walk at the time of the alleged injury. On the 1st day of February, 1897, at the time of the alleged accident, the streets and sidewalks, and the particular place described, in the town of Williamsport, were covered with ice and snow. The appellee, while passing over this inclined plane, fell and received the injury for which damages are claimed in this action. The appellant answered by general denial. There was a trial by jury, and a finding in favor of appellee in the sum of $150. Appellant moved for a new trial, which was overruled, and judgment rendered in favor of appellee for said amount. The motion for a new trial assigns two reasons why the same should have been granted: (1) That the verdict of the jury is not sustained by sufficient evidence; (2) that the verdict of the jury is contrary to law. The only error assigned in this court is the overruling of appellant's motion for a new trial. The evidence is properly before us.

It is the settled law of this state that incorporated towns are liable for injuries occurring from defective streets or sidewalks. Town of Kentland *v.* Hagan, 17 Ind. App. 1, 46 N. E. 43; Scudder *v.* Hinshaw, 134 Ind. 56, 33 N. E. 791; Town of Centerville *v.* Woods, 57 Ind. 192; Lowry *v.* City of Delphi, 55 Ind. 250; Cones *v.* Board, 137 Ind. 404, 37 N. E. 272. It is also well settled that a person is not necessarily precluded from recovering for injuries resulting from defective streets because he had knowledge of such defects. City of Columbus *v.* Strassner, 124 Ind. 482, 25 N. E. 65; Town of Gosport *v.* Evans, 112 Ind.

Personal Injuries—Defective Sidewalk—Liability.

Same—Same—Knowledge of Defect.

133, 13 N. E. 256. The person using a street known to be defective is only bound to use care commensurate with the known danger. Whether appellant was guilty of negligence, and whether appellee was free from fault, and in fact all the questions arising upon the trial of this cause, were controverted questions, and were by the verdict of the jury settled in favor of appellee. The jury returned no findings of fact with their general verdict, and we can only look to the evidence to determine whether or not the judgment should be disturbed. From the evidence the court cannot conclude, as a matter of law, that appellant was free from negligence, nor that appellee did not use such care as an ordinarily prudent person would have used under like circumstances. The undisputed facts are not before the court. The evidence is conflicting, and in such case this court will not disturb the judgment of the lower court. Judgment affirmed.

Conflicting Evidence—Review.

TOWN OF THORNTOWN

v.

FUGATE *et al.*

(*Appellate Court of Indiana, Feb. 2, 1899.*)

Surface Water—Injury to Land—Liability of Town.*—An action will lie against a municipal corporation for collecting surface water, and pouring it upon the land of an individual.

Incorporation—Judicial Notice.*—As judicial notice will be taken of the fact that defendant is an incorporated town, it need not be stated in the pleadings.

Pleading—Assignments of Error.—The first paragraph of the complaint being sufficient, the sufficiency of the second paragraph cannot be questioned under the assignment of error that the complaint does not state a cause of action.

Authority of Officer—Evidence.—The fact that the work from which the injury resulted was done under the supervision of defendant's town marshal, and was accepted and paid for by defendant, is sufficient to show that defendant authorized the work.

*See notes at end of case.

Town of Thorntown *v.* Fugate

APPEAL by defendant from Boone county circuit court. *Affirmed.*

Dutch & Dutch and *F. M. Goldesbery*, for appellant.
Ira M. Sharp, for appellees.

HENLEY, J. Appellees were the plaintiffs below, and commenced this action to recover for injuries to their real estate alleged to have been caused by appellant in collecting together surface water in a ditch or channel, and pouring it upon appellees' property. The complaint was in two paragraphs. Appellant answered by the general denial to both paragraphs of complaint. There was a trial resulting in a verdict for appellees. Appellant's motion for a new trial was overruled, and judgment rendered in favor of appellees. The errors assigned are that the complaint does not state facts sufficient to constitute a cause of action, and that the lower court erred in overruling the motion for a new trial. The first paragraph of complaint in this cause alleges that appellees are the owners of certain described real estate; that, quoting the language of the complaint, "the plaintiffs are, and for the past twenty years have been, the owners in fee simple, and in possession of the following discribed real estate, in the town of Thorntown, Boone county, Indiana, to wit, lots 4, 5, 6, 7, 8, 9, in Cloud and Fisher addition, in the town of Thorntown; that Bow street, in said town, runs east and west; that plaintiffs' said lots are situated on the north side of said street; that for a long distance south of plaintiffs' said lots, to wit, a distance of 300 feet, the natural slope of the land is towards the northeast; that in the southwest part of the town of Thorntown, and about one fourth of a mile distant from the plaintiffs' lots, there is a natural ridge or elevation, about six feet in height, extending in an irregular direction from southwest to northeast; that on the southeast side of said elevation, for a great number of years prior to 1896, there was, and still is, a depression in the surface of the earth, in which was collected a large body of sur-

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face water; that in 1896, about the month of July, the said defendant wrongfully and unlawfully constructed a certain ditch or drain extending from said pond through said natural elevation in a westerly direction, and thence north, across said Bow street, a distance of about a mile, to the south line of plaintiffs' lots; that said defendant constructed, and caused to be constructed, certain other lateral ditches or drains, which were connected by said defendant with said main ditch; that said lateral drains collected all of the surface water off a large area of land, to wit, about 86 acres, and caused the same, together with the water drained by said ditch from said pond, in one body to be cast and drained on plaintiffs' lots; that by reason thereof the soil has been washed away from plaintiffs' lots, and they have been to great expense in hauling earth to fill up and repair the washes occasioned by said ditch, and the value of plaintiffs' lots has been thereby greatly decreased; and the plaintiffs say, by reason of the facts above alleged, they have been, and are, damaged in the sum of one hundred ($100) dollars."

We think the complaint good. It charges appellant with collecting surface water, and pouring it upon appellees' property, thereby damaging it. The rule that an action will lie against a municipal corporation for collecting surface water in a channel, and pouring it upon the land of another, is too well established to warrant a discussion of the subject. Weis *v.* City of Madison, 75 Ind. 241; Davis *v.* City of Crawfordsville, 119 Ind. 1, 21 N. E. 449; City of New Albany *v.* Ray, 3 Ind. App. 321, 29 N. E. 611; Ashley *v.* City of Port Huron, 35 Mich. 296; Gillison *v.* City of Charleston, 16 W. Va. 282; City of Aurora *v.* Gillett, 56 Ill. 132; Ross *v.* City of Clinton, 46 Iowa, 606. This court will take judicial notice of the fact that appellant is an incorporated town, and it is provided by section 377, Burns' Rev. St. 1894 (section 374, Rev. St. 1881), that "neither presumptions of law nor matters of which judicial notice is taken need be stated in a pleading."

Surface Water—Injury to Land—Liability of Town.

Incorporation—Judicial Notice.

The first paragraph of complaint being sufficient, the sufficiency of the second paragraph cannot be questioned under appellant's assignment of error. Railway Co. *v.* Daily, 18 Ind. App. 308, 47 N. E. 1078; Bank *v.* Cooper, 19 Ind. App. 13, 48 N. E. 236; Trammel *v.* Chipman, 74 Ind. 474.

Pleading—Assignment of Error.

The motion for a new trial is based upon seven causes. The seventh reason is not discussed, and is therefore waived. Reasons 1 to 6, inclusive, relate to the sufficiency of the evidence, and are discussed together. We think the evidence fairly sustains the material allegations of appellees' complaint. There is evidence to the effect that appellant, by its work in constructing and deepening a certain drain, caused large quantities of surface water to be collected and discharged upon the land described in the complaint; that said land is the property of appellees; that the water discharged upon appellees' premises is largely in excess of that which would naturally flow upon and over the same; and that appellees have suffered damage thereby. It is contended by counsel for appellant that it is not shown by the evidence in any legal or proper manner that appellant did or caused to be done the work which appellees claim resulted in turning the water upon their property. It is shown that the work was done under the supervision of the town marshal of the town of Thorntown (appellant), and was accepted and paid for by appellant. We believe this sufficient to show that the work was done by the order and under the authority of appellant. It is said in the case of City of New Albany *v.* Ray, *supra:* "By express statutory provision, municipal corporations have exclusive control of streets and alleys, and the establishment and maintenance of drains and sewers." Further along in the same opinion it is said: "The power of a city to improve streets or construct drains does not depend upon the formal adoption by the common council of any plan or system for such improvement or drainage." Under the evidence,

Authority of Officer—Evidence.

Notes

we think the trial court did not err in rendering judgment for appellees. Judgment affirmed.

NOTES.

Drainage of Surface Water—Liability of Municipality for Injury to Land.—It is well settled that the corporate authorities, in the exercise of their power to construct sewers and drains and to grade and improve streets, have no right intentionally to divert the surface water and to discharge it by artificial means in increased quantities or in new and destructive currents upon the lands of others. In this respect a municipal corporation stands upon the same footing as a private individual, and incurs the same liability.

United States.—Arn *v.* Kansas City, 14 Fed. Rep. 237.

Alabama.—Troy *v.* Coleman, 58 Ala. 570; Eufaula *v.* Simons, 86 Ala. 515.

California.—Stanford *v.* San Francisco, 111 Cal. 198; Rudel *v.* Los Angeles County, 118 Cal. 281.

Connecticut.—Danbury, etc., R. Co. *v.* Norwalk, 37 Conn. 109.

Georgia.—Maguire *v.* Cartersville, 76 Ga. 84. See also Phinizy *v.* Augusta, 47 Ga. 260.

Illinois.—Nevins *v.* Peoria, 41 Ill. 502, 89 Am. Dec. 392; Aurora *v.* Gillett, 66 Ill. 132; Aurora *v.* Reed, 57 Ill. 29, 11 Am. Rep. 1; Dixon *v.* Baker, 65 Ill. 518, 16 Am. Rep. 591; Bloomington *v.* Brokaw, 77 Ill. 194; Elgin *v.* Hoag, 25 Ill. App. 650.

Indiana.—Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135; Evansville *v.* Decker, 84 Ind. 325, 43 Am. Rep. 86; Crawfordsville *v.* Bond, 96 Ind. 238, 7 Am. & Eng. Corp. Cas. 488; Rice *v.* Evansville, 108 Ind. 7, 58 Am. Rep. 22; Davis *v.* Crawfordsville, 119 Ind. 1, 12 Am. St. Rep. 361; Monticello *v.* Fox, 3 Ind. App. 481.

Iowa.—Ross *v.* Clinton, 46 Iowa 606, 26 Am. Rep. 169.

Kansas.—King *v.* Kansas City, 58 Kan. 334.

Massachusetts.—Manning *v.* Lowell, 130 Mass. 21.

Michigan.—Pennoyer *v.* Saginaw, 8 Mich. 534; Ashley *v.* Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Defer *v.* Detroit, 67 Mich. 346; Rice *v.* Flint, 67 Mich. 401.

Minnesota.—O'Brien *v.* St. Paul, 18 Minn. 176, 25 Minn. 331, 33 Am. Rep. 470; Kobs *v.* Minneapolis, 22 Minn. 159; McClure *v.* Red Wing, 28 Minn. 186; Peters *v.* Fergus Falls, 35 Minn. 549; Pye *v.* Mankato, 36 Minn. 373, 1 Am. St. Rep. 671; Tate *v.* St. Paul, 56 Minn. 527, 45 Am. St. Rep. 501.

Missouri.—Rychlicki *v.* St. Louis, 98 Mo. 497, 14 Am. St. Rep. 651; Carson *v.* Springfield, 53 Mo. App. 289.

New Jersey.—Field *v.* West Orange Tp., 36 N. J. Eq. 118, 37 N. J. Eq. 600; Union *v.* Durkes, 38 N. J. L. 21.

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New York.—Byrnes *v.* Cohoes, 67 N. Y. 204; Bastable *v.* Syracuse, 8 Hun (N. Y.) 587, *affirmed* 72 N. Y. 64; Noonan *v.* Albany, 79 N. Y. 470, 35 Am. Rep. 540; Seifert *v.* Brooklyn, 101 N. Y. 136, 14 Am. & Eng. Corp. Cas. 440, 54 Am. Rep. 664; Daggert *v.* Cohoes, (Supreme Ct.) 7 N. Y. Supp. 882; Anchor Brewing Co. *v.* Dobbs Ferry, 84 Hun (N. Y.) 274; McCarthy *v.* Far Rockaway, 3 N. Y. App. Div. 379; Carll *v.* Northport, 11 N. Y. App. Div. 120; Bedell *v.* Sea Cliff, 18 N. Y. App. Div. 261; Clark *v.* Rochester, 43 Hun (N. Y.) 271. See also Gillett *v.* Kinderhook, 77 Hun (N. Y.) 604.

Ohio.—Rhodes *v.* Cleveland, 10 Ohio 159, 36 Am. Dec. 82.

Pennsylvania.—Elliott *v.* Oil City, 129, Pa. St. 570; Torrey *v.* Scranton, 133 Pa. St. 173; Bohan *v.* Avoca, 154 Pa. St. 464; Weir *v.* Plymouth, 148 Pa. St. 566.

Rhode Island.—Inman *v.* Tripp, 11 R. I. 520, 23 Am. Rep. 520.

Tennessee.—Burton *v.* Chattanooga, 7 Lea (Tenn.) 739.

Texas.—Houston *v.* Bryan, 2 Tex. Civ. App. 553; Comanche *v.* Zettlermoyer, (Tex. Civ. App. 1897) 40 S. W. Rep. 641.

Vermont.—Winn *v.* Rutland, 52 Vt. 481.

Virginia.—Smith *v.* Alexandria, 33 Gratt. (Va.) 208, 36 Am. Rep. 788.

West Virginia.—Gillison *v.* Charleston, 16 W. Va. 282, 37 Am. Rep. 763; Jordan *v.* Benwood, 42 W. Va. 312.

Wisconsin.—Pettigrew *v.* Evansville, 25 Wis. 223, 3 Am. Rep. 50; Smith *v.* Gould, 61 Wis. 31, 5 Am. & Eng. Corp. Cas. 472; Gilluly *v.* Madison, 63 Wis. 518, 53 Am. Rep. 299.

Canada.—Northwood *v.* Raleigh Tp, 3 Ont. Rep. 347, 4 Am. & Eng. Corp. Cas. 437.

But see Cumberland *v.* Willison, 50 Md. 138.

Illustrations.—Where a municipality deliberately enters upon a scheme of drainage in pursuance of which it will collect water from a large area, and by artificial means cast it upon private property, through which such lands would not otherwise be drained, it threatens a wrong, the commission of which equity will restrain by injunction. Soule *v.* Passaic, 47 N. J. Eq. 28; Miller *v.* Morristown, 47 N. J. Eq. 62. That the property thus threatened is already lawfully subjected to a considerable burden in the drainage of other lands, is no justification for such additional imposition. Soule *v.* Passaic, 47 N. J. Eq. 28.

County commissioners of highways, in draining a public road, have no right to divert the water from its natural course and turn it upon the land of another; in such case, except when they proceed under the right of eminent domain, they possess the same rights and are governed by the same rules as adjoining landowners. Young *v.* Highway Com'rs, 134 Ill. 569, 41 Am. & Eng. Corp. Cas. 201.

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Where surface water collects in a highway by a natural flow from adjoining land, the municipal authorities cannot divert it by conducting it out of its usual course along the highway into another highway, and discharging it thence upon other land of the person from whose land it originally flowed. Slack *v.* Lawrence Tp., (N. J. 1890) 19 Atl. Rep. 663.

A city is liable for damages resulting from the flow of water across the plaintiff's premises through a drain placed across an adjoining street, whereby the flow of water over such premises was largely increased, thus causing the damages. Elliott *v.* Oil City, 129 Pa. St. 570.

In Field *v.* West Orange Tp., 36 N. J. Eq. 118, 37 N. J. Eq. 600, a town, in making street improvements, caused the surface water to be collected and turned into gutters or drains, and led to a point where the earth was low and marshy. It was then discharged on private property, so that a ditch constructed by the owner of land adjoining such marsh was rendered inadequate to drain his land, and he was damaged by the accumulation of water thereon. It was held that the town was liable.

Such an invasion of private property constitutes an appropriation of it to the public use, and the principle exempting municipal corporations from liability for damages occasioned by the exercise of their discretionary power in the construction of sewers does not apply, and the corporation is liable for the damages so caused. Tate *v.* St. Paul, 56 Minn. 527, 45 Am. St. Rep. 501.

Where, in an action against a city for damages caused by the insufficiency of a sewerage system, it appeared that, by reason of the incapacity of the main sewer to carry off the sewage turned into it, sewage was forced through the manhole and inundated the plaintiff's premises, to his damage, and with knowledge of this the city continued to attach lateral sewers to this main sewer, thereby increasing the injury to the plaintiff's property, and the defendant invoked the principle exempting corporations from liability occasioned through the exercise of judicial functions, as a defense to the action, the city was nevertheless held liable. Seifert *v.* Brooklyn, 101 N. Y. 136, 54 Am. Rep. 664, 14 Am. & Eng. Corp. Cas. 440. In so holding, RUGER, C. J., after reviewing the cases referred to by the defendant, said: "We * * * find no warrant in them for the doctrine that a municipal corporation, in the exercise of its discretionary or judicial power of determining when, where, and how to make improvements, such as streets, sidewalks, sewers, etc., has the right to do so upon a plan which substantially involves the appropriation by it of the property of a citizen to the public use."

A municipal corporation is liable for an injury to the plaintiff's house resulting from the cutting of a sewer by the municipal au-

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thorities in such a manner as to cause the collection of large quantities of water which otherwise would not have flowed there, and which were thereby thrown upon his premises. Ashley *v.* Port Huron, 35 Mich. 296, 24 Am. Rep. 552. In this case, after a full examination of the authorities, COOLEY, C. J., said: "It is very manifest from this reference to authorities that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation sent people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other."

Judicial Notice of Incorporation of Municipality.—The courts of Wisconsin take judicial notice of the incorporation of a city of the State; and a complaint against such city need not aver its corporate character, notwithstanding Rev. Stat., § 3205, which probably refers to private corporations only. Smith *v.* Janesville, 52 Wis. 680; Rains *v.* Oshkosh, 14 Wis. 372.

In Kansas City, etc., R. Co. *v.* City of Hopkins, 79 Mo. 98, 7 Am. & Eng. Corp. Cas. 553, it was held that when it is shown that a town or city has availed itself of the privileges of the general incorporation law and become incorporate, the courts are bound to take judicial notice of the rights conferred and powers given it by such, but courts cannot take judicial cognizance of the fact that a particular city or town has availed itself of the privileges of such law and become incorporate. Such fact rests *in pais*, and must be proven as any other fact. If incorporated under the general law, that fact ought to have been found, and the court then could have taken judicial notice of its powers. State *v.* Bench, 68 Mo. 78; Robinson *v.* Jones, 71 Mo. 582; Inhabitants of the Town of Butler *v.* Robinson, 75 Mo. 192.

EHRSAM

v.

CITY OF UTICA.

(*Supreme Court of New York, Appellate Division, Feb. 3, 1899.*)

Change of Grade—Injury to Property—Right of Action.—A tenant of realty under a lease for years is not a real estate owner within the meaning of the New York statute providing that any person whose real estate is injured by a change of grade necessitated by the erection of a certain bridge may maintain on action therefor.

Same—Same—Liability of City.*—A city, in the absence of a statutory provision on the subject, is not liable for damage to abutting property resulting from a change of grade.

APPEAL by city from award of commissioners. *Reversed.*

Argued before HARDIN, P. J., and FOLLETT, ADAMS, MCLENNAN, and SPRING, JJ.

James Coupe, for appellant.

Thomas S. Jones, for respondent.

FOLLETT, J. Words and terms having a precise and well-settled meaning in the jurisprudence of a country are to be understood in the same sense when used in its statutes, unless a different meaning is unmistakably intended. Perkins *v.* Smith, 116 N. Y. 441, 23 N. E. 21; Stephenson *v.* Higginson, 3 H. L. Cas. 638; McCool *v.* Smith, 1 Black, 459; Clarke *v.* City of Utica, 18 Barb. 451; Cruger *v.* Railroad Co., 12 N. Y. 190, 198; Wynehamer *v.* People, 13 N. Y. 378, 427; End. Interp. St. 553; 23 Am. & Eng. Enc. Law, 324. The term "real estate" has a precise and well-settled meaning in the jurisprudence of this state, and the interest of a tenant of realty under a lease for years is not real estate, but is a chattel real, and is not liable to sale on an execution. 1 Rev. St. p. 722, § 5; 2 Rev. St. (Banks' 9th Ed.) p. 1789;

*See notes at end of case.

Laws 1896, c. 547; Lewis *v.* Thompson, 3 App. Div. 329, 38 N. Y. Supp. 316; State Trust Co. *v.* Casino Co., 5 App. Div. 381, 387, 39 N. Y. Supp. 258; Despard *v.* Churchill, 53 N. Y. 192; Smith *v.* Ferris, 6 Hun, 553; Burr *v.* Stenton, 52 Barb. 377, affirmed 43 N. Y. 462; Mayor, etc. *v.* Mabie, 13 N. Y. 151, 158. The interest of a lessee under such a lease does not descend, in case of his death, to his heirs, but goes to his personal representative. "The terms 'real estate' and 'lands,' as used in this chapter, shall be construed as co-extensive in meaning with lands, tenements and hereditaments." 1 Rev. St. p. 750, § 10; 2 Rev. St. (Banks' 9th Ed.) p. 1822, § 10; Laws 1896, c. 547, § 1; 5 Rev. St. (Banks' 9th Ed.) p. 3544, § 1. "The term 'real property' includes real estate; lands, tenements and hereditaments, corporeal and incorporeal." Laws 1892, c. 677; 1 Rev. St. (Banks' 9th Ed.) p. 110, § 3 ("Statutory Construction Law"). "This chapter * * * is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law, indicate that a different meaning or application was intended from that required to be given by this chapter." Laws 1892, c. 677, § 1; 1 Rev. St. (Banks' 9th Ed.) p. 110, § 1. The statutory construction law was in force when chapter 560 of the Laws of 1893, under which the claim was made, was enacted. Leases for years are not real estate. Westervelt *v.* People, 20 Wend. 416, affirming *Id.*, 17 Wend. 674. Such was the rule at common law. 2 Bl. Comm. 16. For definitions of the term "real property," as used in the statutes of this state, see 1 Rev. St. (Banks' 9th Ed.) p. 111, note to section 4. There is no language in chapter 560 of the Laws of 1893 broad enough to bring a lessee for years within the term "owner of real estate," as used in that chapter. Persons having chattel interests in real estate affected by a change of grade of Genesee street are not within the terms of the act, and it seems to me that it was the clear intention of the legislature simply to authorize the owners of abutting real estate damaged by

Change of Grade—Injury to Property—Right of Action.

the change of grade to recover their damages of the city. Such real estate would necessarily be permanently affected by the change of grade, and the owner put to expense to adjust the property to the new grade of the street, and it was not intended to give a claim for damages to tenants occupying rooms or stores, for short periods, in the real estate affected. It is well settled, by a long line of cases, that a municipality of this state is not liable to an owner or tenant of realty abutting on a street for damages caused by changing the grade of the street, unless there is a statute imposing a liability. Radcliff's Ex'rs *v.* City of Brooklyn, 4 N. Y. 195; Conklin *v.* Railway Co., 102 N. Y. 107, 6 N. E. 663; *In re* Grade-Crossing Com'rs, 154 N. Y. 550, 49 N. E. 127; 6 Am. & Eng. Enc. Law (1st Ed.) 548, and cases cited. No matter how great the damages sustained by the claimant may be, he is without remedy, unless he brings his case within the terms of the statute, which I think he is unable to do. *In re* Grade-Crossing Com'rs, 154 N. Y. 550, 49 N. E. 127, does not sustain the contention of the claimant. The statute under which damages were awarded in that case is much broader than the statute under consideration. The statute provides that the "owners or persons interested" in property which should be injured by the change of grade might recover their damages, but no such language, or any language equivalent to it, is found in the acts relating to the Genesee street bridge. Having reached this conclusion, it is unnecessary to consider whether the claimant filed his claim within 30 days,—the time limited by the fourth section of the act. The statute does not provide that costs may be rewarded for the proceedings before the commissioners, or on an appeal therefrom; and though this is a special proceeding, in which the court may grant or withhold costs, I think that, under the circumstances, the claimant having suffered damages which he cannot recover, and the statute not having been construed, the award should be reversed, and the claim dismissed, without costs to either party. All concur.

Same—Same—Liability of City.

NOTES.

Change of Street Grade by Municipality—Liability for Damage.—If a municipal corporation, in changing the grade of a street, keeps within the limits of its authority and exercises reasonable care and skill in the performance of the work, it is not liable for consequential damages incident thereto, in the absence of a constitutional or statutory provision creating such liability.

England.—Whitehouse *v.* Fellowes, 10 C. B., N. S. 779, 100 E. C. L. 765; Mersey Dock *v.* Gibbs, 11 H. L. Cas. 713; British Cast Plate Manufacturers *v.* Meredith, 4 T. R. 796; Sutton *v.* Clark, 6 Taunt. 29; Hall *v.* Smith, 2 Bing. 156, 9 E. C. L. 357.

United States.—Smith *v.* Washington, 20 How. (U. S.) 135; Northern Transp. Co. *v.* Chicago, 99 U. S. 635; Goszler *v.* Georgetown, 6 Wheat. (U. S.) 593; Cheever *v.* Shedd, 13 Blatchf. (U. S.) 258.

Arkansas.—Simmons *v.* Camden, 26 Ark. 276, 7 Am. Rep. 620.

Colorado.—Denver *v.* Vernia, 8 Colo. 399.

Connecticut.—Fellowes *v.* New Haven, 44 Conn. 240, 26 Am. Rep. 447; Hollister *v.* Union Co., 9 Conn. 436, 25 Am. Dec. 36; Hooker *v.* New Haven, etc., Co., 14 Conn. 146, 36 Am. Dec. 477; Bradley *v.* New York, etc., R. Co., 21 Conn. 294; Clark *v.* Saybrook, 21 Conn. 313; Skinner *v.* Hartford Bridge Co., 29 Conn. 523; Burritt *v.* New Haven, 42 Conn. 174.

Florida.—Dorman *v.* Jacksonville, 13 Fla. 538, 7 Am. Rep. 253.

Georgia.—Roll *v.* Augusta, 34 Ga. 326; Americus *v.* Eldridge, 64 Ga. 524, 37 Am. Rep. 89; Markham *v.* Atlanta, 23 Ga. 402; Rome *v.* Omberg, 28 Ga. 46, 73 Am. Dec. 748.

Illinois.—Chicago *v.* Rumsey, 87 Ill. 348; East St. Louis *v.* Wiggins Ferry Co., 11 Ill. App. 254; Quincy *v.* Jones, 76 Ill. 231, 20 Am. Rep. 243; Roberts *v.* Chicago, 26 Ill. 249, Murphy *v.* Chicago, 29 Ill. 287, 81 Am. Dec. 307.

Indiana.—Mattingly *v.* Plymouth, 100 Ind. 545; Baker *v.* Shoals, 6 Ind. App. 319; Snyder *v.* Rockport, 6 Ind. 237; Lafayette *v.* Spencer, 14 Ind. 399; Macy *v.* Indianapolis, 17 Ind. 267; Lafayette *v.* Bush, 19 Ind. 326; Lafayette *v.* Fowler, 34 Ind. 140; Terre Haute *v.* Turner, 36 Ind. 522.

Iowa.—Meyer *v.* Burlington, 52 Iowa 560; Creal *v.* Keokuk, 4 Greene (Iowa) 47; Russell *v.* Burlington, 30 Iowa 262; Burlington *v.* Gilbert, 31 Iowa 356, 7 Am. Rep. 143.

Kansas.—M. E. Church *v.* Wyandotte, 31 Kan. 721.

Kentucky.—Keasy *v.* Louisville, 4 Dana (Ky.) 154, 29 Am. Dec. 395. But see *contra*, Louisville *v.* Louisville Rolling Mill Co., 3 Bush (Ky.) 416, 96 Am. Dec. 243.

Louisiana.—Bennett *v.* New Orleans, 14 La. Ann. 120; Reynolds *v.* Shreveport, 13 La. Ann. 426.

Massachusetts.—Callender *v.* Marsh, 1 Pick. (Mass.) 418; Brown *v.* Lowell, 8 Met. (Mass.) 172.

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Maine.—Mason *v.* Kennebec, etc., R. Co., 31 Me. 215; Hovey *v.* Mayo, 43 Me. 322.

Michigan.—Detroit *v.* Beckman, 34 Mich. 125, 22 Am. Rep. 507; Pontiac *v.* Carter, 32 Mich. 164; (COOLEY, J., reviewing the cases).

Minnesota.—Lee *v.* Minneapolis, 22 Minn. 13; Henderson *v.* Minneapolis, 32 Minn. 319, 6 Am. & Eng. Corp. Cas. 4 (holding also that no change in the rule was effected by the city charter); Keil *v.* St. Paul, 47 Minn. 288.

Missouri.—Tate *v.* Missouri, etc., R. Co., 64 Mo. 149; Broadwell *v.* Kansas City, 75 Mo. 213, 42 Am. Rep. 406; Taylor *v.* St. Louis, 14 Mo. 20, 55 Am. Dec. 89; Hoffman *v.* St. Louis, 15 Mo. 651.

Nebraska.—Nebraska City *v.* Lampkin, 6 Neb. 27.

New York.—Smith *v.* White Plains, 67 Hun (N. Y.) 81; *In re* Furman St., 17 Wend. (N. Y.) 649; Graves *v.* Otis, 2 Hill (N. Y.) 466; Wilson *v.* New York, 1 Den. (N. Y.) 595; Benedict *v.* Goit, 3 Barb. (N. Y.) 459; Waddell *v.* New York, 8 Barb. (N. Y.) 95; Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Mills *v.* Brooklyn, 32 N. Y. 489.

Pennsylvania.—Green *v.* Reading, 9 Watts (Pa.) 382; Henry *v.* Pittsburg, etc., Bridge Co., 8 W. & S. (Pa.) 85; Charlton *v.* Allegheny City, 1 Grant Cas. (Pa.) 208; O'Connor *v.* Pittsburg, 18 Pa. St. 187; Reading *v.* Keppleman, 61 Pa. St. 233.

Rhode Island.—Rounds *v.* Mumford, 2 R. I. 154.

Tennessee.—Humes *v.* Knoxville, 1 Humph. (Tenn.) 403, 34 Am. Dec. 657.

Virginia.—Smith *v.* Alexandria, 33 Gratt. (Va.) 208, 36 Am. Rep. 788; Kehrer *v.* Richmond, 81 Va. 745.

Washington.—Parke *v.* Seattle, 5 Wash. 1.

Wisconsin.—Dore *v.* Milwaukee, 42 Wis. 108; Wallich *v.* Manitowoc, 57 Wis. 9; Smith *v.* Eau Claire, 78 Wis. 457; Alexander *v.* Milwaukee, 16 Wis. 256.

Contra.—A different doctrine has been announced in *Ohio.* In Cohen *v.* Cleveland, 43 Ohio St. 192, the court says: "Injuries resulting from the change of established grades in streets, though made in accordance with the statute, and without negligence or malice, and other injuries of a kindred character, have been held to afford ground for the recovery of damages against municipal corporations. Rhodes *v.* Cleveland, 10 Ohio 159, 36 Am. Dec. 82; McCombs *v.* Akron, 15 Ohio 479; *sub nom.* Akron *v.* McComb, 18 Ohio 229, 51 Am. Dec. 433; Crawford *v.* Delaware, 7 Ohio St. 459; Youngstown *v.* Moore, 30 Ohio St. 133; Keating *v.* Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421. And see Little Miami R. Co. *v.* Naylor, 2 Ohio St. 235; Cincinnati, etc., St. R. Co. *v.* Cumminsville, 14 Ohio St. 523; Richards *v.* Cincinnati, 31 Ohio St. 506; Story *v.* New York

El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146. This court has, however, constantly acknowledged that McCombs *v.* Akron, 15 Ohio 479, and cases following it, is a departure from the current of authority elsewhere; and, although these cases have not found favor with the judges delivering the opinions in Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Hill *v.* Boston, 122 Mass. 378, 23 Am. Rep. 332; Alexander *v.* Milwaukee, 16 Wis. 256; Northern Transp. Co. *v.* Chicago, 99 U. S. 635, we are entirely content with the doctrine, and would not change it if we could. But the justice of the *Ohio* rule, the firmness with which it has been adhered to for nearly half a century, and the manner in which it is recognized and enforced in our statutes, have established the doctrine as a rule of property, and it is now too late to inquire whether McCombs *v.* Akron, 15 Ohio 479, was properly decided." See also the recent case of Smith *v.* Wayne County, 50 Ohio St. 628.

BURNETT

v.

MAYOR, ETC., OF CITY OF NEW YORK.

(*Supreme Court of New York, Appellate Division, Jan. 31, 1899.*)

Defective Sewer—Question for Jury.—There was evidence tending to show that an overflow of sewerage filth into plaintiff's cellar was the result of insufficient sewer pipes maintained by the city. *Held*, that whether the city was liable was a question for the jury.

Same—Liability of City.*—Where a duty imposed upon a municipality arises from the grant of a special power to be exercised for the benefit of its inhabitants, the municipality is liable for the negligence of its officers and servants in the discharge of such duty, and a failure to keep its sewers in proper condition is such negligence.

APPEAL by plaintiff from New York county, trial term. *Reversed.*

Argued before GOODRICH, P. J., and CULLEN, BARTLETT, HATCH, and WOODWARD, JJ.

John M. Perry, for appellant.

Theodore Connoly (*William B. Crowell*, on the brief), for respondent.

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*See notes at end of case.

Burnett *v.* Mayor, etc., of City of New York

GOODRICH, P. J. The plaintiff was the owner of two houses on the easterly side of Vanderbilt avenue, about 138 feet north of 177th street, in the borough of Manhattan, and sues to recover for damages occasioned to her property by an overflow of water from the sewer in 177th street, opposite the southerly side of the plaintiff's premises. There was a drain on the north side of 177th street, extending for several blocks, and connected with a catch basin at a point about 125 feet east of Vanderbilt avenue, and with a receiving basin on the northeasterly corner of Vanderbilt avenue and 177th street. This drain was of wood, and about 14 by 22 inches in size. It was 1½ to 2 feet below the surface, and emptied into a sewer which ran down Vanderbilt avenue to 176th street. There was evidence tending to show that, although the drain was intended merely to carry off surface water, there were connections for sewage between it and houses on both sides of 177th street between Vanderbilt avenue and Third avenue, the latter being three blocks distant, and that on September 18, 1894, after a rainstorm, the cellars of the plaintiff's houses were filled with water, water-closet filth, and refuse, all of which resulted from an overflow of the receiving basin and the catch basin. There had been a similar overflow into the plaintiff's premises in 1889. At the close of the evidence on both sides the court dismissed the complaint upon the ground that the plaintiff had failed to prove a cause of action against the defendant, and from the judgment entered thereon the plaintiff appeals.

Case Stated.

Same—Liability of City.

In Quill *v.* Mayor, etc. (decided at the present term) 55 N. Y. Supp. 889, MR. JUSTICE CULLEN writing, it was held that where a duty imposed upon a municipality arises from the grant of a special power to be exercised for the benefit of its inhabitants, the municipality is liable for the torts of its officers and servants, and that a failure to keep sewers within its territory safe falls within this category; citing Lloyd *v.* Mayor, etc., 5 N. Y. 369. See, also, Seifert *v.* City of Brooklyn, 101 N. Y. 136,

Defective Sewer—Question for Jury.

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4 N. E. 321. Under these decisions we are constrained to hold that the evidence required the court to submit to the jury the question whether the overflow upon the plaintiff's premises was caused by an improper construction or maintenance of the drain and basins. The judgment must be reversed, and a new trial granted. All concur.

NOTES.

Liability of Municipality for Injury Caused by Defective Sewer.—As to whether a municipal corporation in devising or adopting a plan for a sewer or system of sewers acts in a judicial or ministerial capacity, the authorities are not entirely agreed. The better doctrine seems to be that the duty of the corporation in this respect is judicial or *quasi*-judicial in its nature, involving the exercise of judgment and discretion on the part of the municipal authorities, and therefore that the corporation is not liable for any defect or want of efficiency in the plan of sewerage or drainage adopted. Johnston *v.* District of Columbia, 118 U. S. 19; Denver *v.* Capelli, 4 Colo. 25, 34 Am. Rep. 62; Magarity *v.* Wilmington, 5 Houst. (Del.) 530; Harrigan *v.* Wilmington, 8 Houst. (Del.) 140; Van Pelt *v.* Davenport, 42 Iowa 308, 20 Am. Rep. 622; Wicks *v.* De Witt, 54 Iowa 130; King *v.* Kansas City, 58 Kan. 334; Attwood *v.* Bangor, 83 Me. 582; Child *v.* Boston, 4 Allen (Mass.) 41, 81 Am. Dec. 680; Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592; Mills *v.* Brooklyn, 32 N. Y. 489; Garratt *v.* Canandaigua, (Supreme Ct.) 16 N. Y. Supp. 717, 135 N. Y. 436; Schreiber *v.* New York, 11 Misc. Rep. (N. Y.) Super. Ct. 551; Fair *v.* Philadelphia, 88 Pa. St. 309, 32 Am. Rep. 455; Collins *v.* Philadelphia, 93 Pa. St. 272; Bear *v.* Allentown, 148 Pa. St. 80; Smith *v.* Gould, 61 Wis. 31, 5 Am. & Eng. Corp. Cas. 472; Champion *v.* Crandon, 84 Wis. 405.

"The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a *quasi*-judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land." *Per* GRAY, J., in Johnston *v.* District of Columbia, 118 U. S. 19. See also Fair *v.* Philadelphia, 88 Pa. St. 309, 32 Am. Rep. 455.

Notes

A city acting in good faith and within its *quasi*-judicial power and discretion in the location, plan, time of construction, alteration, and enlargement of sewers is not liable for any private damage that may ensue, although it have knowledge of the fact that the sewer is inadequate. Hession *v.* Wilmington, (Del. 1893) 27 Atl. Rep. 830.

When a city constructs a sewer or drain for the purpose of carrying off surface water it is not bound to construct such a one as will be sufficient to carry off all the surface water, in all cases and under all circumstances. Atchison *v.* Challis, 9 Kan. 603.

A lot owner cannot enjoin the construction of a sewer for surface water on the ground that the plan proposed is for a sewer of inadequate size. Americus *v.* Eldridge, 64 Ga. 524, 37 Am. Rep. 89.

A city will be liable for damages where it constructs a sewer to carry off surface water, if the sewer is wholly insufficient, and that fact might have been known to the authorities if they had exercised reasonable care and judgment. Peoria *v.* Eisler, 62 Ill. App. 26.

In *Indiana* and *Michigan*, and the same doctrine seems to obtain in *Canada*, it is held that a municipal corporation is liable for negligence in devising a plan for a sewer, as well as for negligence in carrying the plan into execution, but it is not responsible for mere errors of judgment; and hence if a sewer be inadequate owing to the omission to exercise ordinary care and skill in planning or constructing it, the corporation is liable, but not where the inadequacy is attributable to a mere error of judgment.

Indiana.—Logansport *v.* Wright, 25 Ind. 512; Indianapolis *v.* Hufler, 30 Ind. 235; Indianapolis *v.* Lawyer, 38 Ind. 348; Indianapolis *v.* Tate, 39 Ind. 282; Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135; Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618; Evansville *v.* Decker, 84 Ind. 325, 43 Am. Rep. 86; Crawfordsville *v.* Bond, 96 Ind. 236; North Vernon *v.* Voegler, 103 Ind. 314, 13 Am. & Eng. Corp. Cas. 434; Rice *v.* Evansville, 108 Ind. 7, 58 Am. Rep. 22; Seymour *v.* Cummins, 119 Ind. 148; New Albany *v.* Ray, 3 Ind. App. 321.

But where, in the improvement of a public street, a municipal corporation constructs a sewer in a skillful and careful manner, and keeps the same in good repair, it will not be liable in damages, as a general rule, to the owner of an abutting lot, for the errors in judgment or mistakes of the municipal authorities in regard to the capacity of the sewer to perform the work for which it was intended. Rozell *v.* Anderson, 91 Ind. 591, 4 Am. & Eng. Corp. Cas. 622.

Michigan.—A city is liable for damages caused by an accumulation of water, due to its negligence in providing an insufficient sewer, although the sewer was built with due care and in conformity to the plan adopted by the city. Seaman *v.* Marshall, (Mich. 1898) 74 N. W. Rep. 484.

Notes

"Where the plan adopted by the municipality must necessarily cause an injury to private property equivalent to some appropriation of the enjoyment thereof to which the owner is entitled, then the municipality is liable; but where the fault found is with the wisdom of the measure, or its sufficiency, or adaptability to carry out or accomplish the purpose intended, and where its construction according to the plan adopted invades no private rights, then the municipality is not liable.". *Per* CHAMPLIN, J., in Defer *v.* Detroit, 67 Mich. 346. See Detroit *v.* Beckman, 34 Mich. 125, 22 Am. Rep. 507; Ashley *v.* Port Huron, 35 Mich. 296, 24 Am. Rep. 552.

Canada.—Under Rev. Stat. *Ontario*, c. 184, § 569, providing for the construction of sewers, a municipality is liable for injuries resulting from defects in the plan adopted. Williams *v.* Raleigh Tp., 21 Can. Sup. Ct. Rep. 103.

Liability of Municipality for Failure to Keep Sewers in Proper Condition.—The duty of a municipal corporation to keep sewers and drains in repair and free from obstructions is ministerial, and the corporation is liable for any damage resulting from its failure to perform this duty.

California.—Spangler *v.* San Francisco, 84 Cal. 12, 18 Am. St. Rep. 158; Cook *v.* San Francisco, (Cal. 1890) 23 Pac. Rep. 1094.

Colorado.—Denver *v.* Capelli, 4 Colo. 25, 34 Am. Rep. 62; Denver *v.* Rhodes, 9 Colo. 554.

Delaware.—Hession *v.* Wilmington, (Del. 1893) 27 Atl. Rep. 830; Harrigan *v.* Wilmington, 8 Houst. (Del.) 140.

Georgia.—Savannah *v.* Spears, 66 Ga. 304.

Indiana.—South Bend *v.* Paxon, 67 Ind. 228; Fort Wayne *v.* Coombs, 107 Ind. 75, 57 Am. Rep. 82, 13 Am. & Eng. Corp. Cas. 469; Valparaiso *v.* Cartwright, 8 Ind. App. 429.

Maine.—See Estes *v.* China, 56 Me. 407; Blood *v.* Bangor, 66 Me. 154.

Maryland.—Kranz *v.* Baltimore, 64 Md. 491, 14 Am. & Eng. Corp. Cas. 432.

Massachusetts.—Child *v.* Boston, 4 Allen (Mass.) 41, 81 Am. Dec. 680; Bates *v.* Westborough, 151 Mass. 174, 33 Am. & Eng. Corp. Cas. 122; Allen *v.* Boston, 159 Mass. 324, 38 Am. St. Rep. 423; Melrose *v.* Cutter, 159 Mass. 461. See also Emery *v.* Lowell, 104 Mass. 13.

Minnesota.—Taylor *v.* Austin, 32 Minn. 247; Netzer *v.* Crookston, 59 Minn. 244.

Missouri.—Woods *v.* Kansas City, 58 Mo. App. 272. See also Haney *v.* Kansas City, 94 Mo. 334.

New Hampshire.—Rowe *v.* Portsmouth, 56 N. H. 291, 22 Am. Rep. 464.

New Jersey.—See Jersey City *v.* Kiernan, 50 N. J. L. 246, 20 Am. & Eng. Corp. Cas. 426.

New York.—New York *v.* Furze, 3 Hill (N. Y.) 612; Barton *v.* Syracuse, 36 N. Y. 54, 37 Barb. (N. Y.) 292; McCarthy *v.* Syracuse, 46 N. Y. 194; Nims *v.* Troy, 59 N. Y. 500; Daggett *v.* Cohoes, (Supreme Ct.) 7 N. Y. Supp. 882; Evers *v.* Long Island City, 78 Hun (N. Y.) 242; Paine *v.* Delhi, 116 N. Y. 224, 28 Am. & Eng. Corp. Cas. 348; Wessman *v.* Brooklyn (Brooklyn City Ct.) 16 N. Y. Supp. 97.

Pennsylvania.—Vanderslice *v.* Philadelphia, 103 Pa. St. 102.

Tennessee.—Horton *v.* Nashville, 4 Lea (Tenn.) 39, 40 Am. Rep. 1.

Texas.—Dallas *v.* Schultz, (Tex. Civ. App. 1894) 27 S. W. Rep. 292; Parker *v.* Laredo, 9 Tex. Civ. App. 221.

Utah.—Kiesel *v.* Ogden City, 8 Utah 237.

Virginia.—Chalkley *v.* Richmond, 88 Va. 402, 29 Am. St. Rep. 730, 38 Am. & Eng. Corp. Cas. 228.

Wisconsin.—Harper *v.* Milwaukee, 30 Wis. 365.

And also for damages arising from the negligent performance of such duty. Kranz *v.* Baltimore, 64 Md. 491; Chalkley *v.* Richmond, 88 Va. 402, 29 Am. St. Rep. 730, 38 Am. & Eng. Corp. Cas. 228.

Where a town neglects to keep its drains and sewers free from obstructions, and thereby a landowner is injured by the overflowing of his land, the town is liable for the damages resulting. Bates *v.* Westborough, 151 Mass. 174, 33 Am. & Eng. Corp. Cas. 122.

CITY OF PADUCAH

v.

ALLEN *et al.*

(*Court of Appeals of Kentucky, Feb. 7, 1899.*)

Location of Pesthouse by City—Right to Enjoin.*—The location of a pesthouse near private property by a municipality will not be enjoined, unless it appears a clear and palpable abuse of discretion on the part of the city.

Same—Damages—Joint Action.—A joint action by property owners will not lie to recover for injury to property caused by the location of a pesthouse by a city.

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*See note at end of case.

City of Paducah *v.* Allen

Same — Same—Same—Without Prejudice.—But such an action should be dismissed without prejudice, as any of the plaintiffs thereto so injured may maintain a separate action therefor, as in other cases of nuisance.

APPEAL by defendant from McCracken county circuit court. *Reversed.*

L. D. Husbands, for appellant.
Thos. E. Moss, for appellees.

HOBSON, J. The city of Paducah located its pesthouse in the neighborhood of appellees' property. They then brought this suit to enjoin the city authorities from maintaining the pesthouse at that place, and, the court below having decreed to them the relief sought, the city prosecutes this appeal to reverse that judgment.

Case Stated.

The maintenance of a pesthouse by the city appears from the evidence to be essential. The city authorities are by the statute clothed with discretion as to its location, with the single condition that it must be, at least, one mile beyond the city boundary. In exercising this discretion, and in locating the pesthouse, they have a very delicate duty to perform, for it is an infliction on any neighborhood; and, while all think there are many good places for it, no one thinks it ought to be near him. So, in the discharge of this delicate duty, the city authorities are liable to be met with many difficulties, and their judgment in deciding the matter ought not to be interfered with by an injunction, unless there has been a clear and palpable abuse of discretion on their part. It appears from the proof in this case that the location made was determined upon after several other abortive attempts to get land elsewhere; that it was then regarded the best location available, after considerable investigation; and the proof in this case fails to point out any better place for it. The only place suggested seriously is shown to be inacessible, and, in the judgment of many witnesses, unfit for the purpose.

Location of Pesthouse by City—Right to Enjoin.

Note

If the reasons given in this case are held sufficient to prevent the maintenance of this pesthouse, it will only be a short time, with our rapidly increasing population, before it will be impracticable to have such houses at all within reasonable distances of our cities. The evidence does not justify the conclusion that the cases of smallpox shown in the record originated from the pesthouse. On the other hand, it appears that all these persons took the disease from Mrs. Williams; and as she lived about a half mile from the pesthouse, and had not been there, it is hard to believe that she could have caught the disease from that place. There are some objections to this location, but, considering all the evidence, we do not think there has been such an abuse of discretion here as to justify intervention by injunction.

It appears from the petition that the plaintiffs sought damages for the injury they had sustained in addition to the injunction. The court below dismissed the claim to damages. The damages were several, and a joint action did not lie to recover them; but that no injustice may be done, this part of the petition should not be dismissed absolutely. If any of the plaintiffs have sustained damages by reason of the location of the pesthouse, they can maintain a separate action therefor, as in other cases of nuisance. The judgment of the court below is therefore reversed, and the cause remanded, with directions to it to dismiss the claim for damages, without prejudice, and to dismiss absolutely the remainder of the petition.

Same—Damages—Joint Action.

Same—Same—Without Prejudice.

NOTE.

Damages for Erection of Pest House.—Damages may be recovered of a city for the erection of a pesthouse whereby the same disease infected plaintiff's premises and rendered them unhealthful. Neblett *v.* Nashville, 12 Heisk. (Tenn.), 684.

CITY OF BUFFALO

v.

REAVEY.

(*Supreme Court of New York, Jan. 18, 1899.*)

Municipal Licenses—Taxing Interstate Commerce.*—The enforcement of a city ordinance making it unlawful for any person not a resident of the city to sell farm products without paying for a license, except upon premises owned or leased by the seller, against a resident of another state, for selling such products in bulk, in the city limits, in the car in which they were brought from such state, must be held an unlawful interference with interstate commerce, where there is nothing to show that such ordinance was passed as a police regulation, or to conserve the health of the community.

APPEAL by defendant from municipal court of Buffalo. *Reversed.*

Argued before HARDIN, P. J., and FOLLETT, ADAMS, and MCLENNAN, JJ.

Roland Crangle, for appellant.

Henry W. Killeen, for respondent.

MCLENNAN, J. The defendant was arrested on a warrant issued out of the municipal court of the city of Buffalo on the 6th day of November, 1897, charging him with having violated section 35 of chapter 7 of the ordinances of the city of Buffalo. He answered by putting in a general denial. A trial was had, which resulted in the conviction of the defendant, and a fine was imposed of $20 and costs, which in the aggregate amounted to $23.95. Upon the trial the ordinance was introduced and received in evidence, and the other evidence given was to the effect that the defendant at all the times in question was a resident and citizen of Menominee, in the state of Michigan; that in the

Case Stated.

*See note at end of case.

vicinity of his home, in the state of Michigan, he purchased a car load of potatoes; that he shipped said car load of potatoes to the city of Buffalo, over the Lake Shore & Michigan Southern Railroad, for the purpose of selling them at that place; that when the car load of potatoes arrived at Buffalo, and while they were still in the car in the yard of the railroad company, which was within the corporate limits of the city of Buffalo, the defendant sold the entire car load of potatoes to a dealer in the city of Buffalo, the vendee to unload and remove the potatoes from the car. It appeared that the defendant had not applied for and did not have a license, as required by the ordinances above referred to; and it also appeared that he was not the owner or the lessee of any real estate within the city of Buffalo. At the close of the evidence defendant's counsel moved for a nonsuit, and for the discharge of the defendant, upon the ground that the ordinance under which the warrant was issued was unconstitutional and void, and also upon the ground that it was in contravention of section 27 of chapter 7 of the General Laws of the State of New York, and was therefore void. The motion was denied, and defendant's counsel duly excepted.

The ordinance under which the defendant was arrested and convicted is as follows:

"No person or persons, firm or corporation, except market gardeners selling at retail from vehicles, and hucksters, shall sell or expose for sale upon any of the public markets of the city of Buffalo, any farm or garden product, or any eggs, fruit, poultry, butter, cheese or game, except the same is grown or produced by such persons, firm or corporation, upon lands leased or owned by them. No person or persons, firm or corporation, shall upon any of the public markets of the city of Buffalo, and no person or persons, firm or corporation, except lessees or owners of lands and tenements within the city of Buffalo, shall elsewhere in the city of Buffalo, except in or upon premises owned or leased by them, sell or expose for sale any garden or farm product or fruit, game, poultry, butter, eggs or cheese, as the agent for the owner thereof, or

as a commission merchant, so-called. No person or persons, firm or corporation, shall sell or expose for sale in the city of Buffalo, except in or upon premises leased or owned by them, any farm or garden product, fruit, poultry, game, butter, eggs or cheese, except they shall first pay to the mayor of the city of Buffalo the sum of $100, and receive from him a permit or license to sell such goods and merchandise elsewhere than in or upon premises leased or owned by them, which permit shall be valid for one year. The foregoing last provision shall not apply to merchants and hucksters, citizens of this state, provided they are lessees or owners of lands and tenements within the city of Buffalo, nor shall it apply to market gardeners and farmers when selling their own productions, provided said productions shall have been by them conveyed from the farm or places of production to the city of Buffalo by teaming. Any violation of any of the provisions of this ordinance shall be punishable by a fine of not less than $20, and not more than $100."

So far as applicable to this case, the ordinance, by its terms, makes it unlawful for any person not a resident of the city of Buffalo to sell farm products in the city without obtaining a license, and paying therefor the sum of $100, except upon premises leased or owned by such person, or by a person, firm, or corporation who is the lessee or owner of such premises. The defendant, not being a resident of the state, and not being the lessee or owner of premises in the city of Buffalo upon which the sale in question was made, is subject to the prohibition of the ordinance. If the defendant had been a resident of the state, he would have had the right to sell such products, provided only he was the owner or lessee of real estate within the city of Buffalo, without reference to whether such products were sold by him upon such premises or elsewhere. Under the decisions of the courts of this state, and also the decisions of the supreme court of the United States, it would seem clear that the ordinance in question is in contravention of the commerce clause of the constitution of the United States. In the case of People *v.*

Hawkins, 157 N. Y. 1, 51 N. E. 257, it was held that a statute which by its terms prohibits the importation into this state of goods made by convict labor in another state, unless marked or labeled "Convict Made," was unconstitutional. The court say (page 15, 157 N. Y., and page 261, 51 N. E.), *per* O'Brien, J.:

"The article described in the indictment in this case came into this state from a penal institution in Ohio, through the operation of interstate commerce. The argument in favor of the validity of the statute assumes and asserts that it was not only the purpose of the statute, but of the constitution of the state, to discriminate against such articles, and in favor of the same articles produced by free labor in the markets of this state. It was a regulation of commerce, by means of which the value of merchandise produced in another state was to be depressed, or its sale entirely prohibited. No state can, in its sovereign capacity or in its fundamental law, enact anything in violation of the federal constitution, any more than can the legislature, acting in a representative capacity. * * * A state law which interferes with the freedom of commerce is not saved by the fact that it applies to all states alike, including the state enacting it. Interstate commerce cannot be taxed, burdened, or restricted at all by state laws, even though operating wholly within its own jurisdiction. If it is a regulation of commerce, the law relates to a subject within the exclusive jurisdiction of congress, upon which the state has no power to legislate. It matters not whether the requirements be under the guise of a law requiring a municipal license to sell certain goods, or a health law requiring inspection of the article, or a label law, as in this case, requiring the article to be branded or labeled. When they operate as burdens or restrictions upon the freedom of trade or commercial intercourse, they are invalid."

In the case of Brown *v.* Maryland, 12 Wheat. 446, the court say:

"Any charge on the introduction and incorporation of the

articles into and with the mass of property in the country must be hostile to the power given to congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation."

See, also, Bowman *v.* Railway Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062.

The case of Leisy *v.* Hardin, 135 U. S. 100, 10 Sup. Ct. 681, was a case in which citizens of Illinois, not pharmacists, attempted to import beer into the state of Iowa, to be sold in the original packages, against the statute of the state of Iowa. The court held that they had a right to import the beer and to sell it in the original packages; and the court say that, up to the time when it became mingled with the common mass of the property within the state of Iowa:

"Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere, by seizure, or any other action, in prohibition of importation and sale by a foreign or a non-resident importer."

A large number of other cases might be cited in support of the proposition that where a state seeks by statute to impose a burden upon an article of commerce imported into such state, for sale, from another state of the Union, either by imposing a tax, levying duties, or requiring certain markings or labeling which tend to lessen the value of such property or its selling qualities, any such statute is void, as being in contravention of the commerce clause of the constitution of the United States. This proposition applies with full force in all cases, up to the point where the property so imported has been mixed with the mass of the property of the state into which the same has been imported. In the case at bar the property sold by the defendant had not been mixed with the general mass of property of the state. It was sold in bulk,—an entire car load. By the ordinance in question it is clear that the sale of such property was restricted; that an additional burden was imposed upon it. If the city of Buffalo had the right to require the defendant to pay $100 in

Note

order to entitle him to sell his car load of potatoes in that city, it had the right to impose any other sum, even to the extent of absolutely prohibiting such sale. Clearly, under the authorities, the legislature of the state, by statute, had not the right to impose such burden upon property imported into this state for sale; and, if this be so, it is equally clear that the legislature did not have the power to authorize a political division of the state to impose a like burden, except the article is deleterious to the public health, or is not the article which it is claimed to be. It is of no consequence, even if the ordinance in question affects and applies with equal force to the residents and citizens of the state. One state, under the commerce clause of the constitution, has no right to prohibit the importation into that state of an article of commerce for sale simply because it may have, by act of its legislature, prohibited the sale of such article by its own citizens.

We think that the ordinance in question is in contravention of the commerce clause of the constitution of the United States, and is therefore void. There is nothing to indicate that the ordinance was passed as a police regulation, or to conserve the public health of the residents of the city of Buffalo but, on the contrary, its only purpose and object seem to have been to compel all persons desiring to sell farm or garden products in the city of Buffalo to deal through commission merchants of that city. It follows that the judgment of conviction should be reversed, with costs, and that, the defendant having paid the amount of the fine and costs, restitution of the same should be made.

Judgment of municipal court of the city of Buffalo reversed, with costs, and restitution ordered. All concur, except WARD, J., not voting.

NOTE.

Municipal Taxation of Interstate Commerce.—An imposition which discriminates between residents and non-residents is invalid. Holloway *v.* Police Jury, 16 La. Ann. 203; Marshalltown *v.* Blum, 58 Iowa 184, 43 Am. Rep. 115; St. Louis *v.* Spiegel, 90 Mo. 587;

Albertson *v.* Wallace, 81 N. Car. 479; Nashville *v.* Althrop, 5 Coldw. (Tenn.) 554.

So a tax discriminating against persons, non-residents of a township. Marshalltown *v.* Blum, 58 Iowa, 184, 43 Am. Rep. 115; or between merchants and manufacturers, residing without the limits of the state, and those residing in the city. Nashville *v.* Althrop, 5 Coldw. (Tenn.) 554; or against goods manufactured in other states sold by sample in favor of goods held within the state for sale, is null and void. *Ex p.* Thornton, 12 Fed. Rep. 538; or an ordinance requiring vessels laden with the products of other States to pay a larger sum for the use of the public wharves of a city than where the cargo consists of articles grown or made in the State. Guy *v.* Baltimore, 100 U. S. 434.

GOLDSMITH

v.

MAYOR, ETC., OF CITY OF HUNTSVILLE.

(*Supreme Court of Alabama, Oct. 29, 1898.*)

Occupation Licenses—Powers—Construction of Ordinance.*—A tax imposed by an ordinance on gross amount of sales, is not a tax on the goods themselves, or on the fruits of the sales, but upon the business of selling; and, therefore, is not a property tax, but an occupation or income tax; and a municipal corporation, when authorized by its charter, as is the city represented by plaintiff, may require a license tax, which the state, even, does not require.

Ordinances—Repeal by Implication.*—The strictness to be observed in amending statutes under the constitution of Alabama, does not apply to the amendment of its ordinances by a municipality; and it will not be held that a latter ordinance by implication repeals a former where they are not repugnant to each other, and it does not clearly appear that the latter was intended to repeal the former.

Harmless Error.—Defendant having appeared in the circuit court and gone to trial, a judgment against him for a certain sum should not be reversed upon the mere technical ground that, instead of the judgment, he should have been fined such amount.

APPEAL by defendant from Madison county circuit court. *Affirmed.*

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*See notes at end of case.

Goldsmith *v.* Mayor, etc., of City of Huntsville

Oscar R. Hundley and *Lawrence Cooper*, for appellant.
Jere Murphy and *R. W. Walker*, for appellee.

HARALSON, J. It is well settled, that the amount of tax authorized by the constitution and laws of this state to be levied on property as such, real and personal, has no reference to specific taxes which may be imposed on occupations and privileges; and the power to tax occupations and privileges, includes the power to license them. City Council of Montgomery *v.* Knox, 64 Ala. 463; W. U. Tel. Co. *v.* State Board of Assessment, 80 Ala. 273, 276; Capital City Water Co. *v.* Board of Revenue (Ala.) 23 South. 970; City of Anniston *v.* Southern Ry. Co., 112 Ala. 557, 20 South. 915; Cooley, Tax'n, 578, 579.

Occupation Licenses—Powers—Construction of Ordinance.

A tax on gross amount of sales, is not a tax on the goods themselves, or on the fruits of the sales, but upon the business of selling; is not a property tax, but an occupation or income tax; and a municipal corporation, when authorized by its charter, may require a license tax, which the state, even, does not require. Authorities *supra*.

A right conferred by charter to adopt ordinances, when penalties for their violation are not prescribed by charter, gives the municipality the incidental right to enforce them by reasonable, pecuniary penalties. 1 Dill. Mun. Corp. § 338; Mayor of Huntsville *v.* Phelps, 27 Ala. 55.

The power to levy the privilege tax complained of in this case, seems to have been very plainly conferred by the charter of the city of Huntsville. By section 25 it is provided, "That the said mayor and aldermen shall have authority to levy taxes on the real and personal estate within said city, * * * on capital employed in business in said city, or incomes of persons residing therein, or itinerant or transient merchants, or any business, profession, trade or calling carried on in said city, and on all other subjects of taxation within said city on which the state taxes are now or shall hereafter be levied by the laws of Alabama." Acts 1888–89, p. 236.

This section is very comprehensive, and expressly authorizes a license tax on occupations or privileges, in addition to a property tax as such, whether the state has levied such occupation or privilege tax or not. It is true, however, that the state had prescribed the levy of such a tax, in addition to a property tax. Code 1886, § 454, subd. 5.

But, to make the matter plainer, if possible, it is again provided in section 28, "That said mayor and aldermen shall have power to require merchants, auctioneers, commission merchants, and other persons liable to pay taxes on sales of goods, wares and merchandise, to pay annually a tax on the gross amount of their stock on hand, not exceeding such tax as may by the laws of the state be levied on such stocks." This provision has reference entirely, to an occupation or privilege tax, and not to a tax on property as such. W. U. Tel. Co. *v.* State Board of Assessment, and Capital City Water Co. *v.* Board of Revenue, *supra.*

The fact that the latter part of said section, which authorizes the city to impose a privilege tax on all transient merchants, peddlers and auctioneers, or other persons not having a permanent residence in said city, or a property tax on the value of the goods offered by them for sale, or on the amount of their sales to be paid at such times as the city appoints, does not, by any means, as contended by appellant, limit or modify the preceding provision as to a privilege tax on all merchants, auctioneers and commission merchants permanently residing in and doing business in said city.

Section 29 of the charter makes the further provision, "That power and authority are hereby given to said mayor and aldermen to establish such rules and regulations not inconsistent with this act, for the assessment and collection of the taxes authorized by this act, as they may deem expedient, and to provide and employ all lawful means and proceedings to enforce and collect the same, and to impose such fines and penalties, subject to the restrictions (that the fine shall not exceed $100) hereinbefore expressed, for the violation of the ordinances in reference to taxes and revenues of the city, as

they may deem expedient and proper; provided, that the powers conferred in this section shall not extend to imprisonment for debt."

The appellant was proceeded against before the mayor on affidavit and warrant, for carrying on the business of a merchant in Huntsville, without first obtaining a privilege or license tax for so doing, in violation of a city ordinance in such cases made and provided. On trial before the mayor, he was fined $25 and costs. He appealed to the circuit court, executing a bond in the sum of $50, with two sureties, conditioned that failing in said appeal, the obligors should satisfy such judgment as the circuit court might render in the premises.

In the circuit court, the mayor and aldermen filed a complaint, as required by section 4627,Code 1896 (section 4231, Code 1886), complaining of defendant, that within 12 months before the commencement of the prosecution, defendant did carry on the business of a merchant within the corporate limits of the city of Huntsville, without paying the tax, as required by the privilege tax ordinance of said city, adopted April 21, 1896, as amended June 16, 1896.

The complaint was demurred to on many grounds, the principal one being, that the said ordinance was illegal, unconstitutional and void, but the demurrer was overruled, and defendant pleaded many special pleas, setting up the same defenses as were sought to be made available by grounds of demurrer. A demurrer to these pleas was sustained, and the cause was tried by the court, a jury having been waived, on issue taken on the plea of the general issue.

The original and amended ordinances were introduced, against the objection of defendant, on the ground, specially, that they showed upon their face, that they provided for a tax upon personal property, and not for a privilege tax, and also on another ground, not insisted on in argument.

The original ordinance purports to be "An ordinance fixing the amount of license tax on all occupations and business

within the city of Huntsville for the fiscal year, beginning May 1, 1896," the first section of which provided, "That each and every person, firm or corporation engaged in any of the following occupations or businesses within the city of Huntsville, shall pay an annual license tax as follows: [Omitting all classes except the one in which defendant fell.] Merchants. Stock exceeds $5,000, and not more than $10,000—$35."

The second section provided, that all these licenses might be taken out semiannually, on the 1st May and 1st November of each year.

There were other sections of said ordinance, numbered 3, 4 and 5,—the fourth providing that the ordinance should not go into effect before the 1st May, 1896; and the fifth imposing a fine of not less than $5, nor more than $100, on any one convicted for its violation.

The amendatory ordinance of June 16, 1896, purported to be "An ordinance, amending an ordinance adopted April 21, 1896, entitled an ordinance [reciting the caption of said original ordinance]," and provided that "An ordinance fixing the amount of license tax on all occupations and businesses, within the city of Huntsville, for the fiscal year beginning May 1st, 1896, be and the same is hereby amended as follows:" Then follows the schedule of licenses provided for, the same as in the original ordinance, with the addition of two others covering smaller dealers than were included in the former ordinance.

This was all the latter ordinance purported to amend of the former one, making no reference to the other sections of the original enactment.

The contention of the appellant is, that this latter ordinance repealed the former one, and no penalty is prescribed for its violation. The last did not purport to repeal, but only to amend the other ordinance, but the insistence is, that the one repealed the other by implication.

Ordinances—Repeal by Implication.

It may be replied, that the same strictness for amending statutes under our constitution, does not apply to the amend-

ment of its ordinances by a municipality, and it is impossible to conclude, in reading the original and amendatory ordinance, that the mayor and aldermen, in adopting the latter ordinance, intended to do anything more than to amend the former schedule of licenses so as to include the two classes added, and to leave the original, as thus amended, intact and operative. The other sections of the original, not referred to in the amendment, were never designed to be repealed, in terms or by implication. There is nothing to suggest a repeal by implication,—which is not favored in the law,—and there is no repugnancy between the section as amended, and the others which were left unamended.

There is no complaint that $17.50,—one-half of the annual license tax,—was not the proper amount to be assessed against the defendant, if he was liable for anything. The court below rendered judgment against him and his two sureties for that amount. It is contended by defendant, that such a judgment against him was unauthorized and of no effect.

Appeals from the mayor's to the circuit court are, as prescribed by general statute, to be governed, in all respects, by the laws regulating appeals from justices of the peace in criminal cases. Code 1886, § 1518 (Code 1896, § 2969); and on appeals from justices' courts to the circuit or city court, in criminal cases, the provision is, that the defendant shall enter into bond with two or more sufficient sureties, to appear at the term of the court to which the appeal is taken, until discharged by due course of law. Code 1886, § 4242; Code 1896, § 4640.

The appeal bond in this case was not given in conformity with this section of the Code, but under section 3399 of Code 1886 (section 482 of Code 1896). The circuit court rendered judgment against defendant and his sureties on this bond, in conformity with section 3410 of Code of 1886 (section 493 of Code 1896).

The defendant appeared in the circuit court and went to trial; the court rendered its verdict and judgment against him

Notes

for $17.50. It is objected now that this judgment is erroneous, that instead of judgment being rendered against him, he should have been fined $17.50, and, technically speaking, that is true. In what, however, was the defendant prejudiced by such a judgment? On the trial of appeals in the circuit or city court, the court is governed by the same rules as to evidence, practice, finding of the jury and punishment, as if the case had originated in that court. Code 1896, § 4628 (Code 1886, § 4232). Harmless Error.

When a fine is assessed in the circuit court, that court may allow the defendant to confess judgment with good and sufficient sureties for the fine and costs. Code 1896, § 5423 (Code 1886, § 4502); and execution may issue for the fine and costs, or any portion thereof, remaining unpaid, as in civil cases. Code 1896, § 5424 (Code 1886, § 4534).

We are satisfied that no injury has resulted to defendant from this judgment. Code 1896, § 4333.

From the foregoing it appears without more being said, that the court committed no error in overruling defendant's demurrer to the complaint, nor in sustaining the plaintiff's demurrer to defendant's special pleas. Affirmed.

McCLELLAN, J., dissenting, holding that the ordinance is a tax on property.

NOTES.

Occupation Taxes.—The amount of an occupation tax or license fee may be regulated by and estimated upon the amount of business done. See Albertson *v.* Wallace, 81 N. Car. 479; Walker *v.* Springfield, 94 Ill. 364; Rome *v.* McWilliams, 52 Ga. 251; Berks County *v.* Bertolet, 13 Pa. St. 523; *Ex p.* Hurl, 49 Cal. 557; Western Union Tel. Co. *v.* State, 55 Tex. 314; Porter *v.* Rockford, etc., R. Co., 76 Ill. 561; Ould *v.* Richmond, 23 Gratt. (Va.) 464, 14 Am. Rep. 139. As upon the gross amount of sales, Paddelford *v.* Savannah, 14 Ga. 438; Pearce *v.* Augusta, 37 Ga. 597.

Ordinances—Repeal by Implication.—Before an ordinance can be held to be repealed by implication, it must clearly appear to be so repealed. Whenever the former law and the subsequent law can both be given force and effect, the former law will never be declared to

be repealed by implication. Franklin *v.* Westfall, 27 Kan. 619; Mayor, etc., of N. Y. *v.* Hyatt, 3 E. D. Smith (N. Y.) 156; State *v.* Crummey, 17 Minn. 72. But an ordinance which occupies the entire field of a former one will, as a general rule, repeal such former one by implication. Burlington *v.* Estlow, 43 N. J. L. 13; Decorah *v.* Dunstan, 38 Iowa 96.

SAKS

v.

MAYOR, ETC., OF BIRMINGHAM.

(*Supreme Court of Alabama, Oct. 29, 1898.*)

License Tax—Discrimination.*—A municipal license tax graded according to the value of the stock employed in the business, is not discriminating merely because the cost of a license is not the same to all persons engaged in like business.

APPEAL by defendant from Jefferson county criminal court. *Affirmed.*

Section 2 of said ordinance reads as follows: "Sec. 2. Be it further ordained, that every dealer in any kind of goods, wares, merchandise or other commodities other than dealers in the kind of goods, wares, merchandise or commodities mentioned in section 1 of this ordinance, must take out and pay for a license at rates fixed as follows: When the maximum amount of his stock (not including the value of any goods, wares or commodities for which a license to deal in is required by section 1) on hand at one time within one year preceding the time when such license is applied for (which amount shall be verified by the applicant under oath in every case), $500.00 or less, $5; when such stock is more than $500.00 and less than $1,000.00, $10." And the ordinance thus continues fixing the license tax by the sliding scale in proportion to the capital or stock in such business, and it provides, that when such amount of stock is "$15,000 or less than $20,000" the license tax is $100.

*See note at end of case.

Note

W. R. Houghton and *W. A. Collier*, for appellant.
Robert J. Lowe, for appellee.

COLEMAN, J. The defendant was convicted of doing business as a retail and furnishing merchant without first taking out the license required by the city ordinance for doing such business. It is conceded that he violated the ordinance, which imposed a privilege license upon every retail and furnishing merchant. As we understand the argument of the counsel for appellant, it admits that the city has authority to fix a license tax according to the value of the stock of goods employed in the business, but contends that the ordinance is invalid, for the reason that the privilege tax is unequal and discriminating, in that the license tax is graded according to the amount of the stock employed in the business, and not the same upon all persons engaged in like business. It seems to us that the ordinance proceeds upon the only plan practicable, and by which fairness to all could be secured. It has been the rule always in this state for the state to impose a greater license tax upon dealers in liquors in cities than in the country, and in cities it is regulated by the population. We think all the questions involved in this appeal, or that could be raised, have been adjudicated in one or the other of the following cases: Holt *v.* City of Birmingham, 111 Ala. 369, 19 South. 735; City of Anniston *v.* Southern Ry. Co., 112 Ala. 557, 9 Am. & Eng. R. Cas., N. S., 36, 20 South. 915; City Council *v.* Knox, 64 Ala. 463; Goldsmith *v.* City of Huntsville (Ala.) 1 Mun. Corp. Cas.—, 24 South. 509. Affirmed.

MCCLELLAN, J., dissenting, upon the ground that the ordinance tax is a tax upon property, and not a privilege tax.

NOTE.

License Fees.—The amount of a license fee may be regulated by and estimated upon the value of the property used in the prosecution of the business. Mayes *v.* Erwin. 8 Humph. (Tenn.) 290; Bank

of Utica *v.* Utica, 4 Paige (N. Y.) 399, 27 Am. Dec. 21; State *v.* Stephens, 4 Tex. 137; Goodwin *v.* Savannah, 53 Ga. 414.

And such tax is not subject to the constitutional requirement that taxes shall be uniform and equal. Home Ins. Co. *v.* Augusta, 50 Ga. 530; Burch *v.* Savannah, 42 Ga. 600; Bohler *v.* Schneider, 49 Ga. 195; Kenny *v.* Harwell, 42 Ga. 416; Rome *v.* McWilliam, 52 Ga. 251; St. Louis *v.* Green, 7 Mo. App. 468; Washington *v.* State, 13 Ark. 752; Henry *v.* State, 26 Ark. 523; Straub *v.* Gordon, 27 Ark. 625; Ottawa County *v.* Nelson, 19 Kan. 234, 27 Am. Rep. 101; Fretwell *v.* Troy, 18 Kan. 271; Francis *v.* Atchison, etc., R. Co., 19 Kan. 303; People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581; *Ex p.* Hurl, 49 Cal. 557; Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560; Walker *v.* Springfield, 94 Ill. 364; Thomasson *v.* State, 15 Ind. 449; Baker *v.* Cincinnati, 11 Ohio St. 534; Marmet *v.* State, 45 Ohio St. 63; Leavenworth *v.* Booth, 15 Kan. 628; State *v.* U. S., etc., Express Co., 60 N. H. 219; Standard Underground Cable Co. *v.* Atty. Gen'l, 46 N. J. Eq. 270, 19 Am. St. Rep. 394; Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521; Cincinnati Gas Light, etc., Co. *v.* State, 18 Ohio St. 243; New Orleans *v.* Kaufman, 29 La. Ann. 283, 29 Am. Rep. 328; New Orleans *v.* Turpin, 13 La. Ann. 56; Wintz *v.* Girardey, 31 La. Ann. 381; Texas Banking, etc., Co. *v.* State, 42 Tex. 636; Anlanier *v.* Governor, 1 Tex. 665; Bright *v.* McCullough, 27 Ind. 223; *Ex p.* Robinson, 12 Nev. 263.

PHELPS

v.

LODGE, MAYOR, *et al.*

(*Supreme Court of Kansas, Jan. 7, 1899.*)

Taxation—Mandamus to Compel Levy.*—The mayor and council of a city of the third class may be compelled by *mandamus* to levy taxes to pay a judgment rendered against the city, but the total levy of all city taxes cannot exceed 4 per cent.

Same—Payment of Judgment.—While the statute permits a city to fund its indebtedness, if it refuses to exercise its option to do so, it

*See note at end of case.

Phelps *v.* Lodge, Mayor

then becomes the duty of the mayor and council to levy taxes for the payment of a judgment duly rendered against the city, and the performance of this duty may be compelled by *mandamus*.

Same—Apportionment—Judicial Discretion.—The court has some measure of discretion in awarding writs of *mandamus*, and, in requiring levies of taxes, they will not be so employed as to impose an unnecessarily oppressive burden at one time. In providing for the payment of a large judgment, the whole amount may be apportioned, and collected part at a time, by successive levies.

(Syllabus by the Court.)

APPLICATION for a writ of *mandamus*. Writ granted on conditions.

Arthur Fuller and *C. A. Cox*, for plaintiff.

J. L. Denison, for defendants.

Case Stated.

ALLEN, J. This is a proceeding against the mayor and councilmen of the city of Erie, to compel them to levy taxes to pay a judgment rendered by the district court of Crawford county in favor of David Wilson, the plaintiff's intestate, against the city of Erie, which was afterwards affirmed by this court. City of Erie *v.* Phelps, 56 Kan. 135, 42 Pac. 336. It appears from the agreed statement of facts that an execution on the judgment has been issued, and returned wholly unsatisfied; that a demand has been made on the city officers that they levy a tax for the payment of the judgment; that the total taxes levied on the property in the city of Erie for the year 1898 amounted to 6 3-10 per cent., of which 1 per cent. was city tax for general revenue. This is the only city tax. The total assessed valuations of the property of the city for the year 1898 is $89,340. It appears that all the 1 per cent. levy for city purposes is required to meet the current expenses of the city, and that no part of it can be applied to the payment of plaintiff's judgment. The question to be determined is whether it is the duty of the city officers to make an additional levy for the purpose of paying this judgment.

The contention on the part of the city is that there is no statute making it the duty of the mayor and councilmen to make the levy, and that they can only be compelled by *man-*

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damus to perform a clear and legal duty. Erie is a city of the third class. The statutory provisions relating to the power and duty of city officers in levying taxes, so far as they affect this case, are as follows: By section 53, c. 38, 1 Gen. St. 1897, the mayor and council are authorized "to levy and collect taxes for general revenue purposes not to exceed 10 mills on the dollar in any one year on all the real, mixed and personal property within the limits of said cities taxable according to the laws of this state." Section 75 of the same chapter reads: "At no time shall the levy of all the city taxes for the current year exceed four per cent. of the taxable property of the city as shown by the assessment books of the preceding year." Section 78: "The council may appropriate money and provide for the payment of the debts and expenses of the city; and when necessary may provide for issuing bonds for the purpose of funding any and all indebtedness now existing or hereafter created of the city, now due or to become due. * * *" The power to issue bonds is restricted, however, by the succeeding provisions of the section, and requires instruction by vote of the electors of the city as a condition precedent to their issuance. By other statutory provisions it is made the duty of the city officers to levy taxes annually to pay interest and principal on all bonds of the city. Construing all these provisions together, they amount to this: That, for general revenue purposes, the tax levy is limited to 1 per cent.; for all city purposes, it is limited to 4 per cent. The 4 per cent. limitation has no reference to state, county, or any other than city taxes. The council is authorized by section 78 to provide for the payment of the debts of the city. A judgment is, of course, a debt. Can it be said that it is optional with the council to provide for its payment or not, as it may elect? There would seem to be very little advantage in going to the trouble and expense of obtaining a judgment against the city if no provision for its payment can be compelled. Of course, there must be legislative authority before a tax can be levied. While the lan-

Taxation—Mandamus to Compel Levy.

Same—Payment of Judgment.

guage of section 78 is in form permissive, it is a rule of very general application that where public authorities are authorized to perform an act for the benefit of the public, or for an individual who has a right to its performance, the word "may" is interpreted as meaning "must." The language is that the council may provide for the payment of the debts of the city. The creditors are lawfully entitled to payment. It is therefore not optional with the city officials whether they will or will not provide for their payment; and the word "may," though merely permissive in its ordinary signification, is mandatory as to the payment of judgments against the city. This was the conclusion reached by the court of appeals in the case of Stevens *v.* Miller, 3 Kan. App. 192, 43 Pac. 439, construing the law relating to cities of the second class, which is precisely the same as that under consideration, and accords with what was said in the opinion in the case of Stewart *v.* Town Co., 50 Kan. 553, 32 Pac. 121.

The statute allows the city the option of issuing bonds and funding the debt, if it chooses to do so. This option cannot be exercised by the council without the authority of a vote of the people, but the existence of the option does not destroy the plaintiff's rights. The city must pay. If it chooses, it may fund by issuing bonds; but, if it does so, taxes must ultimately be levied to pay the bonds. It merely amounts to a postponement of the time of payment. The assessed valuation of the city is not sufficient to admit of the payment of the judgment by one levy within the limits allowed by law. Three per cent. in addition to the levy for general revenue purposes might be made. This, however, would make the rate of taxation very high. There is some measure of discretion in awarding writs of *mandamus*, and they ought not to be allowed to operate oppressively. We think a levy of 2 per cent. per annum for the purpose of paying this judgment, and in addition to the levy for general revenue purposes, is as much as ought to be required; but this must be continued each year until a sufficient amount is raised to discharge the judgment. As it

Same—Apportionment—Judicial Discretion.

Note

is now too late to levy taxes for the year 1898, and too early to levy them for the year 1899, the city will be granted until the 1st of June, 1899, to exercise its option of paying the judgment by issuing refunding bonds, if it so elects; but, if it fails to do so, then a peremptory writ will issue directing the mayor and councilmen and their successors in office to levy annually a tax of 2 per cent. on all the taxable property in the city for the purpose of paying the plaintiff's judgment. All the justices concurring.

NOTE.

Mandamus to Compel Levy of Tax to Pay Judgment.—The United States courts have frequently employed the writ of *mandamus* to enforce the levy of taxes for the payment of judgments against municipal corporations when the ordinary process of execution is inadequate. Cairo *v.* Everett, 107 Ill. 75; State *v.* Madison, 15 Wis. 30; State *v.* Supervisors of Beloit, 20 Wis. 79; Wells *v.* Town of Mason, 23 W. Va. 456, 8 Am. & Eng. Corp. Cas. 562; State *v.* Milwaukee, 20 Wis. 91; State *v.* Racine, 22 Wis. 258; Gorgas *v.* Blackburn, 14 Ohio 251; Gooch *v.* Gregory, 65 N. Car. 143; Lutterloh *v.* Cumberland Co., 65 N. Car. 403; State *v.* Jackson County Commrs., 19 Fla. 17; Hitchcock *v.* Galveston, 4 Woods C. Ct. 308; Coy *v.* Lyons City Council, 17 Iowa 1; Olney *v.* Harvey, 50 Ill. 455; Frank *v.* San Francisco, 21 Cal. 680; Galena *v.* Amy, 5 Wall. 705. See Clay *v.* McAleer, 115 U. S. 616; Weber *v.* Lee Co., 6 Wall. (U. S.) 210; Beaulieu *v.* Pleasant Hill, 14 Fed, Rep. 222; Moore *v.* Town of Edgefield, 32 Fed. Rep. 498; Boynton *v.* Newton, 34 Iowa, 510; Soutter *v.* Madison, 15 Wis. 30; State *v.* Commrs. of Buffalo, 6 Neb. 454; U. S. *v.* Board of Supervisors, 2 Biss. 77; U. S. *v.* County Court, 7 S. Ct. Rep. 1171; Devereuax *v.* City of Brownsville, 29 Fed. Rep. 742; City of East St. Louis *v.* U. S., 7 S. Ct. Rep. 739; U. S. *v.* County Court, 7 S. Ct. Rep. 1171. *Compare* Georges Creek Coal & Iron Co. *v.* Alleghany County Commrs., 59 Md. 255; State *v.* St. Martin Parish Police Jury, 33 La. An. 1122.

So whenever the duty of levying a tax to satisfy a judgment against a municipal corporation is plainly and specifically imposed by law upon the corporate authorities, or the ordinary remedy by execution is unavailing and it is the plain and unmistakable duty

Note

of the corporate officers vested with the taxing power to exercise that power for the purpose of satisfying the judgment, *mandamus* will go to compel the levying and collecting of the necessary tax. High on Mand., § 377; Frank *v.* San Francisco, 21 Cal. 668; Coy *v.* Lyons City Council, 17 Iowa 1; Gorgas *v.* Blackburn, 14 Ohio 252; State *v.* Racine, 22 Wis. 258; State *v.* Milwaukee, 20 Wis. 91; State *v.* Supervisors, 20 Wis. 79; State *v.* Madison, 15 Wis. 30; Gooch *v.* Gregory, 65 N. Car. 143; Supervisors *v.* U. S., 4 Wall. (U. S.) 435; Lutterloh *v.* Cumberland Co., 65 N. Car. 403; Galena *v.* Amy, 5 Wall. (U. S.) 705; Benbow *v.* Iowa City, 7 Wall. (U. S.) 313; U. S. *v.* Brooklyn, 10 Biss. (U. S.) 466; Welch *v.* Ste. Genevieve, 1 Dill. (U. S.) 130; U. S. *v.* Muscatine Co., 2 Abb. (U. S.) 53; s. c. *sub nom.* Lansing *v.* County Treasurer, 1 Dill. (U. S.) 522; Butz *v.* Muscatine, 8 Wall. (U. S.) 575; Boynton *v.* District Township of Newton, 34 Iowa 510; Britton *v.* Platte City, 2 Dill. (U. S.) 1; Mayor *v.* Lord, 9 Wall. (U. S.) 409; Wisdom *v.* Memphis, 2 Flipp. (U. S.) 285; State *v.* Rahway, 43 N. J. L. 338; Stevenson *v.* District Township, 35 Iowa 462. See also Fisher *v.* Mayor, 17 W. Va. 628; U. S. *v.* Vernon Co., 3 Dill. (U. S.) 281; U. S. *v.* Mobile, 4 Woods C. Ct. 536; Sheridan *v.* Fleming, 93 Mo. 321; Worthington *v.* Hilton, 13 L. T. R., N. S. 463; U. S. *v.* Buchanan Co., 5 Dill. (U. S.) 285.

But when, by the constitution or by charter, the power of a municipality to levy taxes is limited to a certain rate and the maximum rate is actually levied, *mandamus* will be refused even to a judgment creditor to compel the municipality to levy a greater tax, or levy a specific tax to pay the judgment. United States *v.* Miller Co., 4 Dill. (U. S.) 233; United States *v.* Burlington, 2 Am. L. Reg., N. S. 394; Supervisors of Carroll Co. *v.* United States, 18 Wall. (U. S.) 71; State *v.* Jefferson Police Jury, 34 La. An. 673. And the fact that the whole of the taxes received are swallowed by the necessary current expenses of the municipality, does not affect the power of the court to grant the writ. East St. Louis *v.* People, 6 Ill. App. 76; East St. Louis *v.* Board of Trustees, 6 Ill. App. 130. If a contract is void because it creates a liability in excess of the limit of indebtedness, the municipality has no power to make any appropriation therefor, or to levy a tax to pay interest. Law *v.* People, 87 Ill. 385.

PEOPLE *ex rel.* ECKERSON *et al.*

v.

ZUNDEL *et al.*, TOWN ASSESSORS.

(*Court of Appeals of New York, Jan. 10, 1899.*)

Taxation—Assessments.—The contention, that judgments against assessors reducing assessments for preceding years are necessarily binding upon their successors, in regard to making assessments for a subsequent year, is without merit.

Acts of Assessors—Whether Agents of Town.*—Town assessors are independent public officers, and the town is not responsible for their acts or omissions.

APPEAL by defendants from supreme court, appellate division, Second department. *Reversed.*

Irving Brown, for appellants.
Ralph E. Prime, for respondents.

Case Stated.

MARTIN, J. In 1888 this proceeding was commenced by *certiorari* to review the assessment for that year of a piece of the relators' real property, which contained about 28 acres of land, situated in the town of Haverstraw, N. Y. It was instituted under the provisions of chapter 269 of the Laws of 1880. The appellants were the assessors of the town for the year 1888. In 1886 and 1887 the land in question was assessed by the appellants' predecessors in office at $140,000. In each of those years the relator sued out a writ of *certiorari* to review the assessment, and it was adjudged in each proceeding that it should be reduced to the sum of $45,650. This case involves the assessment for the year 1888 only. Upon the day fixed by law for reviewing assessments, the relators applied to the assessors for a reduction of their assessment to the amount

*See note at end of case.

established as the value of the property by the judgments in the proceedings for the years 1886 and 1887. This application was based wholly upon the claimed effect of those judgments, the relators insisting that they were binding and conclusive upon the assessors as to the amount of the assessment for the year 1888. The appellants, however, declined to make the reduction. This proceeding was instituted; and subsequently, upon the writ and return, the court appointed a referee to take evidence pertinent to the issues, and to report such testimony, with his findings of fact and conclusions of law. The referee took proof, and made and filed the required findings and conclusions. The judgments which had been entered in the former proceedings were received in evidence, over the objection of the appellants. The special term held that the former judgments were binding and conclusive upon the assessors, and that it was their duty to have made the assessment for 1888 conform to those judgments as to the value of the property assessed. To that conclusion, and to the reception of the judgments in evidence, the appellants excepted. The court overruled the appellants' exceptions, and confirmed the findings and conclusions of the referee. It made his findings and conclusions those of the court, to the same effect as though they had been fully set forth in separate findings by it. Thereupon it adjudged that the assessment for the year 1888 was unequal, that the petitioners were thereby injured, that the valuation of $65,000 should be reduced to $45,650, awarded costs against the appellants personally, and ordered the assessment to be corrected in accordance with its determination.

The respondents rely upon the case of People v. Carter, 119 N. Y. 557, 23 N. E. 926, to defeat this appeal. In that case, where, in proceedings to reduce an assessment, it appeared that the assessments for the two preceding years had been made at the same sum, and in similar proceedings there had been a determination fixing the actual value of the property assessed, it was held that in the absence of evidence of an increase

Taxation—Assessments.

of value, or of some change affecting its assessable value, the former adjudications were binding upon the parties to them, upon a review of their assessment for the third year. The doctrine of that case is not applicable to this. There the parties were the same. The assessors were the same persons who made the preceding assessments, and it was under those circumstances that it was held that, upon a review of the assessment for the third year, the prior adjudications were binding upon them, unless there had been some change. But in the case at bar, of the three persons who were assessors in 1888, but one was an assessor in either 1886 or 1887, and he did not verify the roll. So that two of the appellants were not parties to the former proceeding at all, and the one who was took no part in making the assessment in question. Moreover, the court found that in 1888 the amount of the assessment upon the real estate in the town was increased more than $150,000 over those of the two preceding years; that there were numerous changes in the assessed values of the property therein; that the relators' assessment was $75,000 less than in the previous years; and that changes had been made in the condition of the property in the town between the years 1887 and 1888. Thus, the distinction between the Warren Case and the case at bar is manifest, and the former does not sustain the decision in this case.

This leads us to consider, independently of that case, whether the judgments in the former proceedings were binding upon the appellants. We think the facts that a majority of the appellants were not parties to the former proceedings, that changes in the situation of the property of the town had occurred, and that the assessment of the relator's property had been reduced, disclosed a situation where the former adjudications were in no way binding upon the appellants in making the assessments for the year 1888. By statute, the appellants were required to assess all the real and personal property liable to taxation in their town at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor, to make oath that they had

so estimated the value of the property assessed, and were made guilty of perjury if they swore falsely as to the assessment made by them. 1 Rev. St. pt. 1, c. 13, tit. 2, § 17, amended by Laws 1851, c. 176; Laws, 1851, c. 176, amended by Laws 1884, c. 57, and Laws 1885, c. 210. They were bound to assess the property of the relators at its full and true value, and to verify their assessment. There was imposed upon them the duty of exercising their own judgment in appraising it, after employing all the tests ordinarily adopted for that purpose, including a personal survey or examination of the property. When they had exercised their judgment, their determination was subject only to such review or correction as the law prescribes. People *v.* Coleman, 107 N. Y. 541, 14 N. E. 431.

The contention of the respondents that the judgments in the proceedings for the years 1886 and 1887 were binding upon the town of Haverstraw, and hence controlling in this action, cannot be sustained. Assessors are independent public officers, whose duties are prescribed by law. Mechem, Pub. Off. § 28. They are in no legal sense the agents or representatives of the town, and the town is not responsible for their acts or omissions. Lorillard *v.* Town of Monroe, 11 N. Y. 392. Thus, the appellants, in assessing the relators for the year 1888, in no just sense acted for the town, or in any way bound it. What they did was to discharge the public duties imposed upon them by statute, for which the town was in no way responsible. Nor was the town liable for the acts of the assessors for the years 1886 and 1887. Those were independent acts of the persons who were assessors during those years, and neither their acts nor any adjudication against them as such assessors were binding upon the town or the persons succeeding to the office. There was no privity between the persons who were assessors for 1886 and 1887, and those who were assessors during the year 1888, except so far as the same persons were assessors in those years. We are aware of no principle upon which it can be properly held that assessors,

Acts of Assessors—Whether Agents of Town.

who are required to make a sworn appraisal of the value of the property assessed, are concluded by the action of other and preceding assessors, or by any judgment that may be recovered against them in relation to assessments of preceding years. The assessment for each year is a distinct proceeding, separate from other assessments; and a judgment against one set of assessors ought not to be held to control the action of other assessors who are subsequently elected. In People *v.* Roberts, 155 N. Y. 408, 413, 50 N. E. 53, this court held that the determination of an assessing or taxing officer, that an assessment made for one year should be canceled for the reason that the property was not the subject of taxation, was not conclusive upon succeeding officers against assessments made for subsequent years. In that case, in discussing the functions of assessing officers, this court said: "Officers upon whom the duty of making assessments for the purpose of taxation is imposed are independent public officers, exercising public powers, charged with special public duties, possessing no jurisdiction as agents of the state, and for whose acts the state is not liable. Nor is the state responsible for any mistake or misfeasance by them in the performance of their duty. The statute imposes on such officers the duty to perform certain distinct and definite acts." The principle of that case is adverse to the contention of the respondents, and seems quite decisive of the question under consideration.

The court below evidently fell into error when it held that the appellants were bound by the decisions in the proceedings to review the assessments for the preceding years,especially when they made the fact that they did not blindly follow those judgments in determining the value of the relators' property the ground of imputing to them gross negligence, bad faith, or malice as a basis for costs against them personally. Under the circumstances of this case, the former judgments did not deprive the appellants of the right, or relieve them from the duty, of exercising their judgment in the manner prescribed by statute. Until the relators in a

proceeding to review the action of the appellants have established an inequality of assessment, they are not entitled to the relief sought. Obviously, the finding of the court below that the relators' property was assessed unequally, or for a greater sum than its value, was based upon the sole ground that the assessment was for a larger amount than was determined by the courts to have been its value in the years 1886 and 1887.

We are of the opinion that, under the proof and circumstances of this case, the courts below erred in holding that the judgments entered in the proceedings to review the assessments for the years 1886 and 1887 were binding upon the appellants in making the assessments for the year 1888, and that the judgments of the appellate division and of the special term should be reversed, the report of the referee set aside, and the proceedings remitted to the supreme court for further consideration. All concur, except GRAY, J., absent. Judgments reversed, etc.

NOTE.

Assessors not Town Officers.—Town assessors are in no legal sense agents or representatives of the town, but independent public officers. Lorillard *v.* Town of Monroe, 11 N. Y. 392.

See Bank of Commonwealth *v.* Mayor, etc., of New York, 43 N. Y. 184.

MCCONVILLE

v.

CITY OF ST. PAUL.

(*Supreme Court of Minnesota, Jan. 27, 1899.*)

Taxation for Public Improvements—Abandonment—Right to Recovery.*—In 1891 the city of St. Paul instituted proceedings for opening, widening, and extending East Third street therein, and made assessments on abutting property for such purpose. The improvement was partly made, and plaintiff, who owned several

*See note at end of case.

McConville *v.* City of St. Paul

abutting lots, was assessed $1,233.50 thereon, and compelled by judicial proceedings to pay the same to said city. His lots were not benefitted by said grading, and the contemplated work and improvements of said street were abandoned by the city in June, 1893. This action was commenced in January, 1898. *Held*, that the finding of the trial court that the work on said street, and the projected improvement thereon, were never completed, and were wholly abandoned by the city, was justified by the evidence, and that plaintiff is entitled to recover from said city the amount so paid by him, as upon a failure of consideration.

CANTY, J., dissenting.

(Syllabus by the Court.)

APPEAL by defendant from Ramsey county district court. *Affirmed.*

James E. Markham and *Carl Taylor*, for appellant.

Ambrose Tighe and *John W. Lane*, for respondent.

BUCK, J. In January, 1891, the defendant instituted proceedings for opening, widening, and extending East Third street, in the city of St. Paul, from White Bear avenue to the eastern boundary line of said city, a distance of one mile, across section 35, township 29, range 22, in Ramsey county, in this state. This property was then owned by one David J. Hennessey, who opposed such proceedings. The board of public works of said city confirmed the proceedings, and Hennessey appealed to the district court. On the 16th day of June, 1891, the common council of the defendant duly established the grade of said East Third street from Earle street to White Bear avenue, a distance of one mile and a half, and on September 22, 1891, established the grade of said East Third street from White Bear avenue to the east city limits. This last-described grade of one mile so ordered was on the land of Hennessey; the city having given a bond of indemnity to him, in order that he might proceed with the condemnation of said land, and grade the same. Prior to the spring of 1891 East Third Street had been graded as far east as Earle street. In March, 1892, the contract for the improvement was let at the price of $47,000, and an assessment levied to cover it and

the attendant expenses. About $21,000 of this assessment was levied on the Hennessey farm, and $28,000 was divided among the lots fronting on the other mile and a half of street to be graded. The plaintiff owned 14 lots, and the aggregate assessment on these was $1,294.43. One of the lots was assessed $201; 12, $80.50 each; and 1, $76.50. On August 24, 1892, the plaintiff paid this aggregate amount into the city treasury, and the city ever since has had, and still has, his money. The work, as a consideration for which it was paid, was begun and continued at intervals until June, 1893. In 1893 the defendant city council passed the following resolution: "Resolved, that all proceedings heretofore had for the opening, widening, and extension of East Third street from White Bear avenue to the east city limits be, and the same are hereby, in all things annulled, and that all proceedings had for the condemnation of an easement for slopes along the line of East Third street from White Bear avenue to the east city limits be, and the same are, in all things annulled. Resolved, further, that the corporation attorney be, and he is hereby, authorized to stipulate for judgment in the action pending in the United States circuit court, wherein David H. Hennessey is the complainant and the city of St. Paul and Thomas Keough and Daniel Donnelly are defendants, that judgment be entered that the condemnation proceedings heretofore had for the opening of Third street across section 35, town 29 north, range 22 west, be declared null and void, and the condemnation proceedings had for the acquiring of an easement for slopes across said section on the property abutting on the line of East Third street be also declared null and void, and that the assessment made against said section for the grading of East Third street be set aside and declared null and void, and that the defendants in said suit have no right to enter or do any work upon said section under the contract heretofore entered into between the city of St. Paul and Thomas Keough and Daniel Donnelly; and the corporation attorney is also authorized to stipulate for proper judgments in the appeal cases of David J. Hennessey against

the city of St. Paul from the confirmation of the assessments for the opening of East Third street, and also from the confirmation of the assessment for the acquiring of an easement for slopes along the line of East Third street." Upon the trial the defendant also admitted that prior to the 1st day of October, 1893, the contract for doing the work of grading on East Third street from Earle street to the east city limits was rescinded by the city. In its answer the defendant says (referring to Hennessey's objection to the assessment upon his land) that "thereafter such proceedings were had in this court that an order and judgment were entered in said case so appealed to this court by said Hennessey, in all things annulling the assessment as made by said board of public works, in so far as it related to said real estate designated as section 35 aforesaid." The trial court found as a fact "that the defendant has, through its said contractors, done some work on said street east of said Clarence street; but has never completed said street east of said point so that it is capable of being traversed either by teams or foot passengers; that in June, 1893, the defendant ceased entirely work on said street, wholly abandoned said projected improvement, and has never completed the same east of said Clarence street; that the plaintiff's said property is situated between Bock and Kennard streets, which are to the east of Clarence street, and that the nearest of plaintiff's said lots to Clarence street is about one-half mile east of said Clarence street; that between said Clarence street and the first of plaintiff's said lots next east thereof are two deep holes, and that access to plaintiff's property cannot be had over said Third street as the same has been left by the defendant; that, had said improvement been completed as projected, access to plaintiff's said property from the center of St. Paul and to the east city limits would have been secured therefrom, and said property would have been benefitted thereby to the amount of the assessment imposed as aforesaid, to wit, in the sum of twelve hundred and thirty-three dollars and fifty cents ($1,233.50); that the grading of

said street to the extent actually done is not, and at no time has been, of any actual benefit whatsoever to the plaintiff's said property; that the allegations of the pleadings, save as hereinbefore found, are not sustained by the evidence." The court found as conclusion of law that plaintiff was entitled to recover from the defendant the sum of $1,294.43, and legal interest from August 24, 1893. From an order denying a motion for a new trial, the defendant appeals.

The defendant contends that the evidence does not sustain the finding of the trial court that the improvement of East Third street was abandoned by it. We are of the opinion that this contention is not well founded. There is no claim made in defendant's answer, and none was made on the trial, or on the argument in this court, that defendant wishes, desires, or ever intends to grade, widen, or improve said Earle street, or the proposed street over Hennessey land. In fact, no substantial proceedings were ever instituted by the defendant with a view to further carrying on the original proceedings instituted in January, 1891. It is true, the city council, after plaintiff had remonstrated with it on account of its delay in the matter, directed the board of public works to investigate the feasibility of completing the grading of East Third street, not from Clarence street to the east city limits, as contemplated by the original petition, but to White Bear avenue, which is a mile west of the east city limits, and even this proceeding was substantially abandoned; and the plaintiff, fearing that an action for his claim for the money so paid to the defendant would be barred by the statute of limitations, brought this action January 31, 1898. The evidence is quite conclusive that the plaintiff's lots have not been benefited by the grading, or any acts done under the proceedings instituted by the city for such purpose. The city, by judicial proceedings, compelled him to pay to it the full amount of the assessment; and, with commendable forbearance, he waited nearly six years for the city to complete its work after obtaining

his money in August, 1892, which it keeps without the slightest evidence of its intent to complete its work of grading and improving the street named. If it intends to complete this work, it should do so or say so. We do not approve of a great and wealthy city remaining passive, inactive, and its officers silent, upon such matters of public concern, for so long a period, to the great injury of one of its citizens, especially without signifying its intent to proceed with the projected improvement. He had a right to elect to have them act promptly, and determine whether they would abandon or not. Mills, Em. Dom. § 312, says that there should be no unreasonable delay in determining whether or not the proceedings shall be abandoned, and that the public must be held to a speedy and prompt termination of the proceedings. It is to be noted that this is not a case of attempting to condemn and appropriate land for city purposes where the city takes and keeps possession of the property, and has not paid the damages, and where possession would be evidence that it had not abandoned the undertaking. It is evident that the undertaking was an unwise one, and the expense entirely beyond the resulting benefits to all the property involved; and the delay of six years is *prima facie* evidence that the improvements were unnecessary, and doubtless justified the city in abandoning the work. Lewis, in his work on Eminent Domain (section 667), says: "In most of the cases which have arisen, the intention to abandon has been manifested by affirmative acts. But this intention may be manifested in other ways. Where a statute required the final order establishing a highway to be filed with the town clerk within ten days from its date, a failure to do so was held to constitute an abandonment of the proceedings. Where a motion to accept an award was made and lost in a county board, it was held to amount to a vote to abandon. The failure to pay the damages within a reasonable time after their final determination will itself constitute an abandonment of any right to take the property under the proceedings had. What will constitute a reasonable time must, of course, depend

upon circumstances. Four years has been held to be an unreasonable delay, constituting an abandonment; and in the same case it is said that after one year, no offer to pay having been made, the assessment would become *functus officio*."

We are of the opinion that the facts in the case fully justify and sustain the findings of the trial court that the defendant city had abandoned the grading of East Third street as contemplated in the proceedings under which the assessment was made and levied, and that, as the plaintiff has received no benefit or consideration for the money paid by him to the city by coercion of law, he can maintain this action to recover it back. Valentine *v.* City of St. Paul, 34 Minn. 446, 26 N. W. 457. This being so, it is not necessary for us to consider the question as to whether the plaintiff has a remedy by *mandamus* to compel the board of public works to proceed with the improvement. If he had such a remedy, it was not an exclusive one.

The appellant claims that the rule laid down by this court in the case of Strickland *v.* City of Stillwater, 63 Minn. 43, 65 N. W. 131, is not applicable to the case at bar, or that, if it is, it should not be adhered to. In that case the city adopted a general plan for grading parts of the several streets, which included that part of a street in front of Strickland's lots, and extending beyond the same in each direction. The assessment included her property, and all other property benefited by such grading, although not abutting on the improvement. Part of the contemplated grading was done, but none in front of her property, and the street was graded nearly up to her property. The city abandoned doing any further work, although she had paid the full amount of her assessment for making the entire improvement; and she sued the city for the sum so assessed and paid, and recovered judgment for the full amount, upon the ground that her property had been assessed upon the basis of frontage, and, no grading having been done on the street in front of her abutting property, she was entitled to recover the whole sum paid by her as benefits.

This court held that this was error, but that as her property was so assessed, and it having been done in pursuance of a general plan which included an assessment upon all property benefited by such improvement within the limits of such plan, she might have been benefited by such grading done in part, although none of it was done directly in front of her property, and, if so, her property was liable for the amount of such benefit, whatever it might be, and that whatever sum she was entitled to receive, if any, would be the difference between the actual benefits added to her property by the grading as an entirety,so far as done, and the sum which she was compelled to pay to said city of Stillwater. We think this rule a sound and equitable one, protecting the rights of the citizen, and imposing a duty upon the municipality to perform its obligations. The principle upon which that case rested is applicable to the one at bar; that case differing from this only in the fact that in the Strickland Case the plaintiff received some benefit from the partial performance of the improvement, and in this the plaintiff received none. The counsel for the appellant contends that, if the rule in the Strickland Case is to be adopted as the law of this state, some peculiar situations will result. Any such conditions can be easily avoided by municipal corporations fully, completely, and honestly performing their duties and obligations, and not sheltering their defaults behind the plea of nonaccountability. The doctrine in the Strickland Case is adhered to. Our conclusion is that the plaintiff is entitled to recover in this action from the defendant city the amount so paid it by him, with interest, as upon a failure of consideration. Order affirmed.

CANTY, J. I cannot concur. The majority assume that they are following Strickland *v.* City of Stillwater, 63 Minn. 43, 65 N. W. 131, but the facts in that case were wholly different. There it was not claimed that any money was squandered or spent foolishly. Every dollar expended returned a full dollar's benefit to the property holders, but the city in fact abandoned a part of the improvement district

and a part of the improvement. That action was brought on the theory that the plaintiff's property was wholly without the limits of any assessment district which the city authorities were warranted in carving out for the purpose of assessing thereon the cost of the improvements as actually made. We held that the property was not outside such an assesssment district, but that as the assessment district was in fact changed by the abandonment of the improvements in a part of it, and the improvements also changed, the court or the jury must in this action make a new assessment to meet these new conditions, and determine the amount of benefit to plaintiff's property and award him the balance assessed against the property. Here the plaintiff is not outside of the assessment district, or on the edge of it, where his assessment should be lighter, but he is in the very midst of it; and it is not claimed that the change made in the district by the abandonment of the improvement of the street through the Hennessey tract before any improvement was made in that part of the street could in any event make the assessment against plaintiff's property any the less. But this action is brought upon the theory that when a special tax is levied on property specially benefited by an improvement, to defray the cost of making that improvement, and the money is spent in the improvement, but does not complete the same, and it turns out, in the light of subsequent events and subsequent experiences, that the improvement was an injudicious undertaking, the taxpayer can recover back from the city the money thus injudiciously spent in the abortive enterprise. On the same principle, if a general tax of, say, five mills on the dollar, was levied to build a court house, and the money was all spent in building a court house on such a foolish plan that before it was completed it fell down and became a total wreck, any taxpayer who paid his part of the tax could immediately recover it back from the county. There is no difference in this respect between a special tax on property specially benefited and a general tax on all the property in the city or county. Each is levied by the same sovereign power.

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That power acts in its sovereign capacity, not in its private or contractual capacity, in levying such a tax, and therefore is not liable for the failure of the tax to bring any benefit to him who pays it. True, the special tax is levied on the supposition that the party paying it is benefited to an amount equal to the amount of the tax. But the question of whether he is or will be thus benefited is tried at the time the assessment is made, and cannot be subsequently reviewed in an action brought to recover back the tax after it is paid, merely because the improvement was injudiciously undertaken. Of course, where the assessment district and the improvements are changed after the tax is levied and collected, so that one taxpayer has paid more than his share, he may recover the excess. Such was the Strickland Case. But here he is allowed to recover back taxes collected and squandered in the construction of abortive improvements. A part of the tax so collected has not been expended, and I concede that plaintiff may recover back such part; but the tax was not collected with an implied warranty that it would bring to the taxpayer the benefit contemplated, and for the portion of it which has been spent he has, in my opinion, no claim against the city.

NOTE.

Abandonment of Improvement—Recovery Back of Assessment.—Where, under compulsion, an abutting owner has paid money to a city under a void assessment for opening a street, and the corporation has abandoned the improvement, he may recover such money. Bradford *v.* City of Chicago, 25 Ill. 412. And such recovery has been allowed even though the money was voluntarily paid if there has been unreasonable delay in, or abandonment of the improvement. Bradford *v.* City of Chicago, 25 Ill. 412; Godfrey *v.* Claflin, 21 Peck. 1.

And see also Jersey City *v.* O'Callaghan, 41 N. J. L. 349; Jersey City *v.* Riker, 38 N. J. L. 225; Peyser *v.* New York, 70 N. Y. 497.

STATE (WHITE, PROSECUTOR)

v.

MAYOR, ETC., OF ATLANTIC CITY *et al.*

(*Supreme Court of New Jersey, Jan. 13, 1899.*)

Liquor License—Certiorari at Instance of Citizen.*—Where a license to sell intoxicating liquors has been granted by a municipal body contrary to law, such action may, in the discretion of this court, be reviewed on *certiorari*, at the instance of a citizen and taxpayer of such municipality.

Same—Refusal to Grant—Power to Reconsider.—The refusal to grant such a license, by a municipal body whose licensing power is subject to the same restrictions and provisions as are imposed by statute upon the like power when exercised by the courts of common pleas of this state, is final; and subsequent reconsideration of such action, resulting in the granting of the license, is contrary to law and void.

(Syllabus by the Court.)

CERTIORARI by the state to review the action of the common council in granting a license. License set aside.

Argued June term, 1898, before LIPPINCOTT and GUMMERE, JJ.

Thompson & *Cole*, for prosecutor.
David J. Pancoast, for defendants.

GUMMERE, J. John Weidemer having applied to the city council of Atlantic City for a license to keep an inn and tavern, his application was denied, and a license refused. This action of the city council was had on the 7th day of February, 1898. Two weeks later, the city council reconsidered its action, and granted to Weidemer the license which it had originally refused to him. The legality of this action is challenged by the prosecutor.

Case Stated.

*See note at end of case.

State *v.* Mayor, etc., of Atlantic City

A preliminary question is presented for determination, namely, whether the plaintiff has any right to stand as the prosecutor of a writ of *certiorari* for the purpose of contesting the legality of Weidemer's license. Where a license to keep an inn and tavern is granted by a local body contrary to law, a *certiorari* to review such action may be granted, at the instance of a resident and taxpayer of the place where the license is to be exercised. Many cases may be found in our reports where this has been done. Dufford *v.* Staats, 54 N. J. Law, 286, 23 Atl. 667, and cases cited. It has usually happened in such cases that the party applying for the writ has not only been a resident and a taxpayer, but also that he has remonstrated before the local body against its action. But the fact that the applicant for the writ has been a remonstrant against the action complained of, although it may be persuasive in determining whether or not his application should be granted, is not jurisdictional. The fact that the applicant is a resident and taxpayer, without more, is sufficient to justify the action of the court in allowing the writ.

Liquor License—Certiorari at Instance of Citizen.

The prosecutor in this case both sued out the writ and prosecuted it before this court as a citizen and taxpayer of Atlantic City. He did not, however, submit any proof upon this point; and it is insisted that, because of his failure to do so, this writ should be dismissed. The rule that the plaintiff in *certiorari* must prove his status is not universal, and those cases in which he prosecutes as a citizen and taxpayer are exceptions. In those cases his right to prosecute will be presumed to exist without proof, in the absence of any call for evidence on the subject. West Jersey Traction Co. *v.* Board of Public Works of City of Camden, 58 N. J. Law, 365, 33 Atl. 966. The defendants therefore are not entitled to a dismissal of this writ, by reason of the fact that no affirmative proof was submitted by the prosecutor of his status as a citizen and taxpayer.

It remains to be considered whether the action of the city

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council in granting a license to Weidemer, after originally refusing his application, was illegal. By the tenth section of the charter of Atlantic City, its city council is vested with the sole and exclusive right and power of licensing every inn and tavern keeper residing in the city limits, "subject to the same restrictions and provisions, and in like manner in every particular, as the same is or may be lawfully done by the inferior court of common pleas in this state." P. L. 1866, p. 320. In the case of Dilkes *v.* Pancoast, 53 N. J. Law, 553, 22 Atl. 122, this court, in determining the question of the legality of a course of action by the court of common pleas of Gloucester county, similar to that which is now complained of, declared that its original action in rejecting the application for a license was final; that its power in the premises was thereby exhausted; and that it could not, at a subsequent day, reconsider its action. The legislature having declared that the provisions of the law regulating the granting of licenses by the courts of common pleas of the state should apply to the granting of licenses by the city council of Atlantic City, it is manifest that under the decision in Dilkes *v.* Pancoast, *supra*, the municipal action complained of was wholly invalid. The license granted to the defendant Weidemer will therefore be set aside, with costs to the prosecutor.

Same—Refusal to Grant—Power to Reconsider.

NOTE.

Granting of Liquor License—Certiorari to Review. — Where the authorities grant a license to sell intoxicating liquors on a petition on its face insufficient, a writ of *certiorari* may be awarded to review the proceeding on the application of any person who has duly filed a counter-petition. Loeb *v.* Duncan, 63 Miss. 89. See Corbett *v.* Duncan, 63 Miss. 84; State *v.* Atlantic City, 48 N. J. L. (19 Vr.), 118; or becomes otherwise connected with the action. McCreary *v.* Rhodes, 63 Miss. 308. But where at the time of granting the license no objection was raised by any citizen, and there was no counter-petition on file, qualified voters are not entitled to prosecute a writ of *certiorari* to have the proceedings reviewed, they not being parties to the record. Lexington *v.* Sargent, 64 Miss. 621; McCreary *v.* O'Flinn, 63 Miss. 204.

STATE *ex rel.* ORR

v.

CITY OF NEW ORLEANS *et al.*

(PROTESTANT ORPHANS' HOME *et al.*, INTERVENERS.)

(*Supreme Court of Louisiana, March 7, 1898.*)

Validity of Ordinance—Right to Contest—Taxpayers.*—Taxpayers have a standing in court to contest, upon proper charges, the validity of a municipal ordinance, or a contract executed under it, whenever its enforcement may increase the burden of taxation. Handy *v.* City of New Orleans, 1 South. 593, 39 La. Ann. 107.

Same—Appropriation for Charitable Institutions.—Article 51 of the constitution, which declares that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such, and no preference shall ever be given to, nor any discrimination against any church, sect or creed of religion, or any form of religious faith or worship, nor shall any appropriation be made for private, charitable or benevolent purposes to any person or community: provided, this shall not apply to the state asylums for the insane and deaf, dumb, and blind, and the charity hospitals and public charitable institutions conducted under state authority," refers to appropriations made by the General Assembly, and to moneys taken from the State treasury, not to appropriations made by the common councils of cities, or to moneys taken from the city treasuries.

Same—Same—Constitutional Law.—Article 56 of the constitution prohibits the loaning, pledging, or granting of any fund of the political corporations of the state to any person or persons, association or corporation, public or private. To the extent that any appropriation made by a city council in favor of a charitable association of the city exceeds in amount the precise legal equivalent rendered by the particular institution which is to receive it, for the support of just such persons as the city itself would be legally chargeable with, the appropriation evidences a donation and a gift; and by reason of that fact it is beyond the power of the council to

*See note at end of case.

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make it, under article 56 of the constitution. Appropriations to charitable associations, granted from a general sense by the council of the laudable objects and purposes of those institutions, but having no fixed, certain, established consideration for the same, are at best remunerative donations for possible anticipated future benefits, and not being based upon contract, express or implied, are *ultra vires*.

Municipal Funds—Authority of City Council.—The twenty-first and twenty-second sections of the charter of the city of New Orleans, defining the duties of the city comptroller and treasurer, did not contemplate that an appropriation by the city council should *per se* justify the withdrawal of the amount of the same from the city treasurer. They obviously intended that each claim presented under an appropriation should be subjected to examination and auditing, and should be based upon affirmatively shown, exact, legal consideration.

BREAUX and MILLER, JJ., dissenting.
(Syllabus by the Court.)

APPEAL from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, JUDGE.

Petition, on the relation of Henry Orr, Sr., against the city of New Orleans and others, for injunction and *mandamus*. The Protestant Orphans' Home and others intervened. From a judgment in favor of defendants and interveners, relator appeals. *Reversed.*

Case Stated.

In a petition filed by him in the civil district court on November 30, 1896, relator averred that he was a citizen and taxpayer of the city of New Orleans, and the father of two children of school age, who were dependent upon the public schools of that city for an education, and who were attending said schools; that, through lack of sufficient appropriation of public money from the public treasury of said city by the city council of New Orleans to the school fund of said city for the year 1896, the school board of said city had declared that it would be necessary to close the said public schools during the month of November, 1896; that in the budget of expenditures of the city of New Orleans for the year 1896 the city council of the city

of New Orleans appropriated and ordered taken from the public treasury of the city of New Orleans the sum of $40,200, and same paid to sundry private, charitable, and benevolent institutions, to wit, Evangelical Lutheran Orphan Asylum (Bethel), Protestant Orphans' Home, St. Vincent's Orphan Asylum, Wet Nurses, St. Mary's Orphan Boys' Asylum, House of Good Shepherd,German Protestant Orphan Asylum,Touro Infirmary, Faith Home for Aged Widows, Lafon's Old Folks' Home, St. Vincent's Asylum, New Orleans Female Orphan Asylum, Female Orphan Asylum of the Immaculate Conception, German Protestant Home for the Aged and Infirm, Jewish Home, Home for Incurables, Maison Hospitaliere, St. Alphonsus' Asylum, St. Vincent's Half-Orphan Asylum, Louisiana Asylum, St. Joseph's Boys' and Girls' Asylum, Holy Family Asylum, St. Joseph's Asylum of the Little Sisters of the Poor, Protestant Episcopal Children's Home, Eye, Ear, Nose, and Throat Hospital, Convalescents' Home, Louisiana Freedman's Asylum, St. Vincent de Paul's Society, Conference of St. Joseph and Immaculate Conception, St. Mary's Asylum of Little Sisters of the Poor, and the Carmelite Nuns, which said sums, in various amounts, were ordered to be paid to private persons and communities, as members and representatives of various churches, sects, and denominations of religion, for an itemized statement of which reference was made to the said budget of 1896, adopted by the said city council on the 14th day of January, 1896, and to the resolution of apportionment thereunder adopted by said council or its committee on the 4th day of February, 1896, both of which were made part of the petition; that the existing city council, through its committee on budget and assessment, had prepared a budget of expenditures of the public moneys and of appropriations from the public treasury of the city of New Orleans for the year 1897, which budget had been published in the newspapers of the city of New Orleans (said budget having been prepared and provisionally adopted by said committee on the 3d day of December, 1896), which budget

was made part of the petition; that by said budget it was proposed to appropriate and take from the treasury of the city of New Orleans a sum of money largely in excess of the sum of $27,000, for private, charitable, and benevolent purposes, in various amounts, to sundry private persons and communities, as representatives of, and in aid of, sundry churches, sects, and denominations of religion; that said proposed budget would be adopted by the council, and said sums taken from the treasury for said purposes, unless the said council and officers were restrained from so doing by due process and orders of court; that none of the appropriations referred to either in the budget of 1896 or that of 1897 were for the state asylums for the insane, deaf, dumb, or blind, nor for any charity hospital, or other charitable institution or institutions conducted under state or any other public authority; that all of said appropriations and proposed appropriations were illegal, contrary to law, and beyond the power of the city council to make or to have made; that of the appropriation of 1896 a large portion had been paid from the treasury by the city treasurer on the warrant of the comptroller, and the amounts remaining would be so paid out, unless said officers were prevented from doing so by law; that, if said balance were paid out under the budget of 1896, there would not be sufficient money in the treasury to permit the public schools to remain open for the full time during the year prescribed by law, and relator's children would be prevented from attending same during the time they are closed; that if the appropriations proposed in the budget of 1897 were made, and the money taken from the treasury, there would not be left money enough therein to keep open the public schools during the year 1897 for the full term prescribed by law and custom in said city, and relator's children would be prevented, as stated, from attending school, and thereby prevented from obtaining the education at the public schools, which was the right of every American citizen, and citizen of the state of Louisiana; that relator's interest in the subject-matter was largely in excess of $2,000. In view

of the premises, relator prayed for citation upon the mayor, the treasurer, and the comptroller of the city, and also the common council; that relator have judgment against them, decreeing all of said appropriations null and void, and prohibiting any further payment of the money appropriated by the budget of 1896 to the said private, charitable, and benevolent purposes, to said purposes and communities, and prohibiting the council from appropriating any money for said purposes out of the treasury for the year 1897 as proposed, or any subsequent year, and that the mayor be prohibited from approving, and forbidden to approve, any ordinance making such appropriation or appropriations; that the comptroller be forbidden from drawing, and the treasurer from paying, any warrant thereunder, or any money under color of appropriation for any private, charitable, or benevolent purpose whatever, to any person or community, or in aid of any church, sect, or denomination of religion whatever, and for all writs and orders necessary to enforce the judgment to that effect. Defendants, through their counsel, filed an exception of no cause of action, and prayed that the suit be dismissed. This exception was referred to the merits. On the 9th of January, 1897, relator filed a supplemental petition, in which he alleged that since the filing of his petition the appropriations for 1897, which had been referred to as proposed appropriations, had been in fact made in the budget of 1897, and had been approved by the mayor, and were made to the persons and communities named in the supplemental petition, for the amounts therein stated. Relator substantially reiterated the allegations of his original petition as to the illegal character of the same, and set forth *de novo* his grounds of complaint. He averred that payments made out of the appropriations for the purposes stated were illegal and without warrant of law. He prayed that they be so decreed, and that the officials participating therein be decreed liable for the same, and ordered to pay the same into the city treasury. He reiterated the prayer of his original petition,

adding thereto relief in consonance with the allegations of the supplemental petition. The defendants answered under benefit of their exception. They pleaded first the general issue. They then admitted that the city of New Orleans had made certain appropriations for the years 1896 and 1897 to the institutions named in plaintiff's petition, but they averred that said appropriations were made strictly in accordance with law. The Protestant Orphans' Home, the Association for the Relief of Jewish Widows and Orphans, the German Evangelical Lutheran Bethlehem Orphan Association, the Touro Infirmary, and the New Orleans Convalescents' Home, parties in whose behalf and for whose benefit, among others, appropriations had been made in the budgets of 1896 and 1897, intervened in the suit, to join the defendants and protect their interests under the appropriations. Their petitions of intervention were substantially alike. They averred that they were each an incorporated charity under the laws of the state, and owners of an asylum for the care, nourishment, and protection of the indigent sick and orphans; that they were possessed of no adequate means of support, and depended very largely upon contributions made by charitable persons, and appropriations made by the city of New Orleans similar to those contained in the budget of 1897; that the city made use of their institution for the care and support of their indigents and orphans; that said contributions and appropriations were absolutely necessary for the charitable uses for which the institutions were respectively founded; that the appropriations attacked in no wise contravened the charter of the city of New Orleans, and were not *ultra vires*, but were lawful and proper under the constitution and laws of the state; that relator disclosed no interest for the relief prayed for; and that the court was without jurisdiction *ratione materiæ*. The district court, after trial, rendered judgment in favor of defendants and interveners; refusing the injunction and *mandamus* prayed for, and dismissing the suit. Plaintiff appealed.

State *v.* City of New Orleans

John C. Wickliffe and *Arthur H. Browne*, for appellant.

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NICHOLLS, C. J. (after stating the facts). In Handy *v.* City of New Orleans, 39 La. Ann. 107, 1 South. 593, this court held that taxpayers have a standing in court to contest, upon proper charges, the validity of a municipal ordinance, and a contract executed under it, whenever its enforcement may increase the burden of taxation; that a petition of taxpayers discloses a cause of action, which charges that a municipal corporation has passed an ordinance in excess of its powers, and in violation of prohibitory provisions in its charter. Under the authority of that decision the district court properly overruled the exception of no cause of action filed by the defendants. The petition in this case not only contained averments of the character referred to, but specially charged that the ordinances attacked were violative of the state constitution.

Validity of Ordinance—Right to Contest—Taxpayers.

Relator's principal attack on the ordinances of the city is based upon the provisions of article 51 of the constitution, which declares that "no money shall ever be taken from the public treasury, directly or indirectly in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such, and no preference shall ever be given to, nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship, nor shall any appropriation be made for private, charitable or benevolent purposes to any person or community: provided, this shall not apply to the state asylums for the insane and deaf, dumb and blind, and the charity hospitals and public charitable institutions conducted under state authority." This article is found under

Same—Appropriation for Charitable Institutions.

the heading of "Limitation of Legislative Powers," and is evidently directed against taking money out of the state treasury, and to prohibiting the general assembly from itself making appropriation for private, charitable, or benevolent purposes, other than for those specially enumerated and permitted. As the acts complained of are not those of the general assembly, but of the city of New Orleans, we are called on to comment upon that particular article of the constitution only in so far as relator bases upon it the contention that a prohibition upon the powers of the legislature itself carries with it, as a necessary and unavoidable consequence, a similar prohibition upon all the subordinate or inferior political organizations in the state. He argues that all the powers of such bodies are derived from the general assembly, and that the latter cannot confer upon its creatures powers which it cannot exercise itself. This argument rests upon a misconception of the original powers of the general assembly, and the effect upon them of constitutional limitations. It has been repeatedly held that, unlike the congress of the United States, which must find affirmative authority for its action, the legislature of a state is unlimited in its powers, except in so far as the latter are restricted within certain limitations by constitutional provisions. It has also been repeatedly held that the scope of these restrictions is not to be extended; that they are not to be enlarged by construction beyond their terms. The decision in Hughes *v.* Murdock, 45 La. Ann. 935, 13 South. 182, to that effect, merely announces a well-recognized doctrine. Articles 44 and 45 of the constitution afford examples of cases where the limitations upon the powers of the general assembly are made to extend not only to the direct actions of the legislature itself, but to its powers of delegation of authority to others. The position taken, that there is manifest inconsistency between prohibiting the legislature from taking action upon some particular subject, and yet authorizing it either to permit subordinate corporations to do

so, or authorizing it to charge them with the duty of doing so, is not logically correct. For instance, there may be certain duties, the performance of which, from their character, could be and should be exacted in certain localities for the public good, the expenses of which should be made to be contributed to by the people of that special locality. While the people of the state at large might have an interest in seeing those duties performed, and they should, through the legislature, have supervision and control over them to some extent, it might be very unfair and improper to cast a general burden in respect to the same upon the whole people. Different localities should be made to bear exclusively the burden, to the extent that they were specially and directly concerned in the subject-matter. We would see no inconsistency in the constitution's forbidding the legislature from appropriating the state's money for the care of the indigent insane in the different parishes, and yet either making it obligatory upon it to charge the various parishes with the duty of properly providing for them, or leaving that matter open for legislative discretionary action. The duty of providing for the indigent insane would still remain properly a matter of public concern. The constitution would simply have shifted the burden of the duty from the state at large to the people of the particular places where those unfortunate persons should chance to be found.

Deciding, however, that the provisions of article 51 of the constitution do not extend to this case, leaves for examination how far the ordinances of the city are chargeable with illegality under article 56 of that instrument, and under its own charter. It is best that no technical obstacle be thrown in the way of the solution of that question at this time. It is subject to be presented at any moment, and it should be disposed of at once, to the end that the constitutional convention now in session may take such action in the matter as it may be deemed right and to the best interests of the people of the state.

Article 56 of the constitution declares that "the funds,

credit, property or things of value of the state, or of any political corporation thereof shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private; nor shall the state or any political corporation purchase or subscribe to the capital or stock of any corporation or association whatever, or for any private enterprise. Nor shall the state, nor any political corporation thereof, assume the liabilities of any political, municipal, parochial, private or other corporation or association whatsoever; nor shall the state undertake to carry on the business of any such corporation or association or become a part owner therein; provided the state through the general assembly shall have power to grant the right of way through its public lands to any railroad or canal." No mention is made in this article of appropriations which might be sought to be made for private, charitable, or benevolent purposes; nor is the prohibition of the article aimed at grants, as being "directly or indirectly in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof as such." The prohibition against grants is as broad as words can make it, and is totally independent of the object to which the grant, when made, would be applied. The article is found in the constitution, as is article 51, under the heading of "Limitation of Legislative Powers"; but, unlike the latter, its terms extend expressly to a prohibition of the "granting of the funds of any political corporation of the state to any person or persons, association or corporation, public or private." The granting of the funds of the political corporations to private persons or corporations being itself prohibited, independently of the body attempting to make the grant, or to permit the same to be made, removes from the general assembly the power, through any delegation from it, to confer authority on parishes or cities in the state to make them. Grants of parishes or cities of that character, based on such delegation, would be null and void. The article prohibits the loaning, pledging, or granting of

Same—Same—Constitutional Law.

any funds of the political corporations of the state to any person or persons, association or corporation, public or private. It must be conceded that the institutions in whose behalf the appropriations attacked were made are private corporations. The public authorities have no control or authority over them.

The question remains whether the ordinances attacked evidence "grants" of the funds of the city of New Orleans. Webster defines the verb "to grant" as signifying: (1) To give over; to make conveyance of; to give the possession or title of; to convey,—usually in answer to petition. (2) To confer or bestow, with or without compensation,—particularly in answer to prayer or request. (3) To admit as true when disputed or not satisfactorily proved; to yield belief to; to allow; to yield; to concede. Synonyms: To give, confer, bestow, convey, transfer, admit, allow, concede. And the word "grant," as a noun, as signifying: (1) The act of granting; a bestowing or conferring; concession; admission of something as true. (2) The thing granted or bestowed; a gift; a boon. (3) A transfer of property by deed or writing, especially an appropriation or conveyance made by the government; as a grant of land. It is argued that the ordinances of the city of New Orleans are not grants of the funds of the city; that they are not gifts; that the city stands charged with the duty of supporting its own infirm, sick, and disabled paupers; that the institutions in question have taken upon themselves that obligation; that they have discharged, and will continue to discharge, the same; that in so doing they have relieved the city, and will continue to relieve the city from the pecuniary obligations which but for them it would have itself to incur; that the city has received, and will receive, a *quid pro quo* for the amounts appropriated; that the city has the legal power to discharge its duties through agencies other than itself, or by contracts with other parties. Relator replies that though the duty of municipal corporations to support their own infirm, sick, and disabled paupers is recognized in

article 163 of the constitution, that article is not self-executing; that it directs the general assembly to make such duty obligatory, but that that body has as yet taken no action in that direction. We are not aware of any action taken by the general assembly under the requirements of article 163 of the constitution, other than Act No. 42 of 1880, which relates only to police juries. We think that the general assembly construed the provisions of that article, as to its obligation of taking affirmative action, as applying only to parishes; that the second clause of the article itself affirmatively made it the duty of municipal corporations to support the indigent infirm, sick, and disabled persons within their borders. Whether this was its view of the matter or not, whether it was a correct view or not, we need not inquire; for we are not called upon in this case to say whether legal proceedings could be legally taken out to coerce the city to make provision for such persons, but whether when they had done so their action would be unauthorized, in the absence of a statute of the state making it obligatory upon them to do so. We have no hesitation that, if the only attack made upon the action of the city would have been the absence of such a statute, it would have been utterly groundless. There can be no question as to the duty of cities to support indigent sick, disabled, and infirm persons within their borders; but the question is how, and under what circumstances and conditions, are they to do so. Had the city built or leased premises having this object in view, and placed employees of its own over them, and made provision through ordinances for the payment of the expenses incurred in so doing, no one, we suppose, would question the validity of such ordinances by reason of a want of power in the city to pass them. Had the city made express contracts, either with individuals or with private corporations, by which the latter would have come under a well-defined civil liability to perform such duties for the city, the officers of the city having legal power to exact performance according to the terms of the contract, and to hold such parties liable for breach of the same, and

had the city passed ordinances appropriating money to carry out its obligations towards the other contracting parties under such contracts, and had the validity of such appropriations been submitted to us, a very different question would have been presented from that actually before the court. As matters stand, we find a case where there exist not only no contractual relations, either express or implied, between the city and the various corporations on whose behalf the ordinances attacked have been made, but none between those institutions and the indigent sick, poor, or disabled of New Orleans. Neither the city, nor those indigent sick or disabled persons themselves, would have a right of action to coerce anyone of them into receiving or supporting them. Their action in that matter would be purely and exclusively within their own control. Their boards of directors, and not the city officials, would decide who should be received and supported, how many should be so supported, and for how long. On the other hand, none of those institutions, by virtue of the fact that they had received and supported indigent orphans or indigent infirm men and women, and that the city had made appropriations in their behalf, would have such a vested right in such appropriations as to prevent a repeal of the ordinances making them, or to give a right of action against the city. We do not understand that the city pretends to have any legal supervision or control over these institutions. We do not understand the amount of the appropriations to the different institutions to be graded upon any fixed, established relation between such amounts and services which could be legally charged for by each, as based upon a precise legal equivalent consideration received. We understand the council to exercise its own judgment as to how much each institution should be granted, and to exact no accounting for the amounts received; that the appropriations are made in bulk, and drawn out in bulk,—no specific vouchers being given as to how the sums received had been or would be applied. Under such circumstances, the appropriations, though based

upon a general sense by the council of the laudable objects and purposes of the institutions, have really no fixed, certain, established consideration for the same. There may be, or there may not be, a consideration for some of them; and that consideration may be, or it may not be, an equivalent for the moneys received. Those moneys, at the best, would be received by way of remunerative donations for possible anticipated future benefits, not by reason of contract, express or implied. Whether or not any particular appropriation was in support of a real or a remunerative donation would rest in doubt, and for determination would have to be tested in each case by extrinsic evidence. To the extent, at least, that any given appropriation exceeded in amount the precise legal equivalent rendered by the particular institution receiving it for the support of just such persons as the city itself would be legally chargeable with, the ordinance would evidence a gift and a donation to it, and by reason of that fact would be beyond the power of the council to make. Coates *v.* Campbell, 37 Minn. 498, 35 N. W. 366. There are no fixed, established conditions attached by the ordinances as conditions precedent either to the earning of or the payment of the moneys to the different institutions. There is no attempted or visible check upon either the council, the finance committee, the comptroller, or the treasurer. The right of payment seems to be made to rest simply upon the fact of appropriation itself,—nothing more. There seems to be nothing to guide either the comptroller, the finance committee, or the treasurer in approving or auditing claims advanced under the ordinances. We do not think that ordinances of that character are sustainable, or that such ordinances were in the contemplation of the general assembly in framing the charter of the city of New Orleans.

Municipal Funds —Authority of City Council.

We think the twenty-first and twenty-second sections of the charter, defining the duties of the comptroller and the treasurer, contemplated something more than an appropriation by the council, to justify a withdrawal of the amount of the same from the city treasury.

They obviously intended that each claim should be subjected to examination and auditing, and should be based upon affirmatively shown, exact, legal consideration. Institution *v.* Henderson (Colo. Sup.; Nov., 1882) 31 Pac. 714; Coates *v.* Campbell, 37 Minn. 498, 35 N. W. 366. In the discussion of questions of law, we are not authorized to act upon our own ideas of what should or should not be either in the constitution or in the statutes of the state touching matters of policy or expediency. We have to take matters as we find them fixed and determined by those whose province it is, under the distribution of the powers of the state, to deal with them. The trouble in this case arises not so much from the fact that estimates were made in the annual budget for the application of moneys for the support of the poor under the heading of "Public Charities," as that, through the method adopted by the common council, payments of the amounts specified in the ordinances are authorized to be drawn by the various institutions themselves, by and through the force of the ordinances and the appropriations themselves, freed from the necessity of establishing affirmatively before the finance committee, the comptroller, and the treasurer that the amounts about to be received were based, not upon a grant, but upon a valid, legal, existing, and equivalent consideration. We do not know from the record what course has been followed by those officers in the execution of the ordinances. The methods followed for payment are not attacked. In the Cook Co. Case, 125 Ill. 540, 18 N. E. 183, the supreme court of Illinois, referring to the necessity it was under of pronouncing a judgment which was in evident opposition to its sympathies and wishes,—setting aside an appropriation made in aid of parties engaged in most praiseworthy work, but under circumstances prohibited by the constitution,—said: "They are engaged in the best and holiest of all works,—that of reforming and caring for the unfortunate. We agree with counsel for appellee that they do their work faithfully and well. It is so shown by the proof. It is not for us to discuss the wisdom or unwisdom of this prohibition.

There it is, couched in terms so emphatic that it cannot fail to challenge attention. Any scheme, even though hallowed by the blessing of the church, that surges against the will of the people as crystalized into their organic law, must break in pieces as breaks the foam of the sea against the rock on the shore." Our duty, under similar circumstances, is no less imperative than that imposed upon the supreme court of our sister state.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the ordinances of the city of New Orleans making appropriation in favor of any charitable or benevolent institution of the city of New Orleans, under and by the force of which appropriations themselves the institutions in whose favor they are made can draw out from the treasury of the city the funds so appropriated, are illegal and unconstitutional; and the finance committee and chairman of the finance committee are enjoined and inhibited from indorsing or approving any requisition, claim, or demand for payment of said appropriation, or any part thereof, by force simply of the appropriations themselves; and the comptroller of the city of New Orleans is hereby enjoined and inhibited from warranting upon the treasurer for the payment of any portion of said appropriations; and the treasurer is enjoined and inhibited from paying any portion of said appropriations simply by force and by reason of the appropriations themselves.

BREAUX, J. (dissenting). I cannot agree with the decision. I think that the principles are of such importance that they justify an expression of the views by which I am influenced in dissenting.

A sentence can properly have but one proper meaning. Upon analysis, it is not manifest, by any means, that the limitations of articles 56 of the constitution invoked by the plaintiff apply, and that the one meaning of the articles of

the constitution was to prevent all payments from the various treasuries throughout the state, save those permitted by the article above cited; in other words, that the "public treasury" (words used in article 56) is not only the "treasury" of the state, but also the treasury of every municipality in the state. It is a safe rule of interpretation of a sentence to consider the whole instrument of which it forms a part. In this case the different articles of the constitution germane to the subject are proper subject for consideration. All reference to the "treasury" in the constitution is the state treasury, in my view. Take up article 43, and read: "No money shall be drawn from the treasury except in pursuance of specific appropriations made by law: nor shall any appropriation of money be made for a longer term than two years. A regular statement of receipts and amount of expenditures of all public moneys shall be published every third month, in such manner as shall be prescribed by law." No one will contend that this law is a limitation binding the treasuries of every parish, city, and town in the state. The article invoked by plaintiff (56) is, if anything, more limited in its application. The words used are "public treasury." Evidently in this case only the treasury of the state was meant. Let us take an instance of the simplest kind, to show that these articles are not applicable as limitations on municipal corporations throughout the state. Suppose an incorporated village, with powers similar to those vested in police juries, in the interior of the state, with a council anxious to make an appropriation from its treasury to go to the relief of suffering indigence in the little community; the council would not be expected to comply with the forms and limitations intended by the state constitution to safeguard the proper administration of the state affairs in the office of the state treasurer. To carry the illustration a little further (applying to some extent here, as I think), after the appropriation, made in due form, prompted by the purest feeling, they (the members of this little council) meet Catholic, Protestant, and Jew, organized in the little community to aid those in distress and misery, and say to

them: "You are contributing your full share towards relieving the poor, suffering human beings now with us. The community also has been taxed. Here is a contribution, small in amount, from the treasury of the municipality. You have taken care of these destitute persons, so worthy of pity. You have given them food and clothing, and they have warmed themselves at your fires. They are not inclosed within cold, bare walls, but they are near good family influence. Take this amount, and add it to your depleted funds. It is the offering of our little municipality." If these good men of the municipal council were told that they had violated article 56 of the constitution of the state, prohibiting aid to "church, priest, or minister," they would be amazed. The proposition that the city of New Orleans is without authority to aid its destitute, suffering poor, is not, in my view, sustainable. It is made the duty of the city to "support its own infirm, sick and disabled paupers." Article 163. The convention did not surely ordain in one article that the city shall support its infirm, and in other articles (such as article 56) render the task almost, if not entirely, impossible. The first clause of article 163 looks to further legislation, it is true, for its enforcement. The second clause, however, is independent of such a requirement. It is separate from the first, as relates to legislation, and absolutely governs, without the necessity of legislation to make it self-executing. It is a duty imposed upon the city. The clause is self-enforcing. See Cooley, Const. Lim. (4th Ed.) p. 101. But granted for a moment, only, that the power has not been delegated to the city, and that the constitution and statutes are absolutely silent upon the subject, it would hardly be an exaggeration to say that a modern city could not exist, after a proper manner, without some implied power to take care of its indigent and infirm. It will not be denied that the corporation possesses the power to pass such ordinances as may be necessary to preserve the peace and good order of the city, to suppress causes of grievances to the public, and to exercise general police power in the city. May not the corporation, under

those powers, exert the implied power needful to lessen the evil growing out of indigency, want, and misery, thereby rendering less difficult the functions of local government? It is useless to disguise the fact that, when misery weighs a man down, he is too often prone to commit wrongs and crimes. The number of crimes increases with the increase of indigency and misery, say those who have given the subject careful attention and study. Not so much, I must say, as is frequently imagined. Enough, however, to make it the imperative duty of the authorities by all reasonable means to seek to better the condition of the suffering and indigent poor. There is a rule of construction laid down in the books which applies. It gives the benefit of the doubt to the weak, and makes us incline, in doubtful cases, towards mercy. *Lieb. Herm.* If there is doubt, it should be resolved in favor of the appropriation, and as supporting the presumption that the amount was expended in accordance with the spirit and intention of the ordinance of the city council. When this is done, really, Catholics, Protestants, Jews, and no one else, have cause to complain. The cost is a mere trifle, compared with the good accomplished. If it only serves to awaken the good sentiment of the community, that would be enough, of itself. But it is far more far-reaching than mere sentiment. It is in the nature of a virtue,—worthy, all will admit, of being so considered and treated. It is not a mere business transaction, not a donation going forth without consideration. It realizes an ample return, and *quid pro quo*, in which every Catholic, Protestant, and Jew, and every other member of the community, has an interest. It is in no sense sectarian. If it has the least tendency in that direction, it only makes the Christian a better Christian, and a Jew a better Jew, and improves the good order, tone, and welfare of the entire community.

Now, with reference to judicial control of the corporation, if it has the power at all (I think it has), the appropriation and distribution are within its own surveillance and control. Mr. Dillon, in his work on Municipal Corporations, upon

that subject (section 58) says, substantially, that the discretion is vested in the governing body, and while within the scope of its authority it cannot be controlled by the courts. The legislative functions of a municipal council are presumably properly exercised. It is reasonable, unless the contrary appears, to infer that the appropriations were properly made and expended. The details in matter of the expenditure of a fund are within municipal control. I therefore respectfully dissent.

MILLER, J. (dissenting). In my view, the only article of the constitution of obvious pertinence to this controversy is that which affirms and directs the legislature to enforce the duty of parishes and municipal corporations to support within their limits the "infirm, sick and disabled paupers." Const. art. 163. That function of municipal government, I suppose, would be clear, without the recognition in the organic law, designed, in harmony with article 51, to exclude any power in the legislature of appropriating money from the state treasury to relieve destitution in cities or parishes; hence the expression, every parish or municipal corporation shall support "its own paupers." The other articles introduced in the discussion, prohibitive of any aid from the public treasury to churches, sects, religious denominations, preachers, or priests, or grants of public funds or property to corporations, public or private, or to associations, are placed in the constitution as limitations on the legislature, but, it may be conceded, announce principles that without any constitutional direction would be deemed restrictions on municipal corporations, with no power to give away public funds or aid religious sects or institutions. But I cannot perceive in the appropriations involved in this discussion any purpose to grant public property to corporations or associations, or to give assistance to churches, sects, or religious denominations. The appropriations are to corporations and associations, but the object of the appropriations is the relief of the helpless aged, the orphans left without support, the indigent insane,

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and other types of destitution to be found in all cities, and that have to be provided for, to the extent of the financial liability of the city, from the public treasury. The city, with no institutions of its own adequate to take care of the poor thrown on public and private charity, uses the corporations and associations named in the ordinances as instrumentalities to expend the scanty amount the city is enabled to set aside in its annual budget for charities. There are, in my opinion, no constitutional restrictions as to the method for the city to distribute its charity fund, and for years it has been through corporations and associations similar to those specified in the ordinances that distribution has been effected. The selection of such associations or corporations has not been because of their religious character, but because, organized in part to administer charity to the poor, the corporations selected have been supposed better adapted to that purpose than any agencies of the city government. Viewing these corporations and associations named in the ordinances as mere instrumentalities by which the city performs the function of making what provision it can for the poor of the city, I cannot appreciate the basis on which we can hold the appropriations opposed to the organic law, or illegal. I therefore dissent.

NOTE.

Right of Taxpayer to Contest Appropriation of Municipal Funds.—Resident taxpayers have the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of a municipal corporation, or the illegal creation of a debt which they, in common with other property holders, may otherwise be compelled to pay. Bayle *v.* New Orleans (La.), 8 Am. & Eng. Corp. Cas. 329; Crampton *v.* Zabriskie, 101 U. S. 601; Gifford *v.* N. J. R. Co., 10 N. J. Eq. 171; Baltimore *v.* Gill, 31 Md. 375; Wade *v.* Richmond, 18 Gratt. (Va.) 583; Page *v.* Allen, 58 Pa. St. 338; Stevens *v.* Railroad Co., 29 Vt. 549; Webster *v.* Harwinton, 32 Conn. 131; Terrett *v.* Sharon, 34 Conn. 105; Merrill *v.* Plainfield, 45 N. H. 126; Normand *v.* Otoe Co., 8 Neb. 18; Oliver *v.* Keightley, 24 Ind. 514; Drake *v.* Phillips, 40 Ill. 388; Grant *v.* Davenport, 36 Iowa 396; Hooper *v.*

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Ely, 46 Mo. 505; Douglass *v.* Placerville, 18 Cal. 643; Patterson *v.* Bowes, 4 Grant (Can.) 170; West Gwillimbury *v.* Hamilton R. Co., 23 Grant (Can.) 383; Hood *v.* Lynn, 1 Allen (Mass.) 103; Tash *v.* Adams, 10 Cush. (Mass.) 252; Claflin *v.* Hopkins, 4 Gray (Mass.) 502; Stetson *v.* Kempton, 13 Mass. 272; New London *v.* Brainard, 22 Conn. 553; Booth *v.* Woodbury, 5 Am. L. R. (N. S.) 202; Bergner *v.* Harrisburg (Com. Pleas Dauphin Co.), 1 Pearson (Pa.) 291; Murphy *v.* Jacksonville, 18 Fla. 318; Grant Co. *v.* Bradford, 72 Ind. 455; Cornell *v.* Guilford, 1 Den. (N. Y.) 510; Henderson *v.* Covington, 14 Bush (Ky.) 312.

In Claflin *v.* Hopkins, 4 Gray (Mass.) 502, it was *held* that a vote of money to purchase uniforms for an artillery company was unauthorized and would be restricted by injunction even after the uniforms had been purchased upon the strength of the ordinance, and deposited in the armory of the company.

See Acts La. 1882, No. 20, pp. 20, 21, §§ 7, 8; 1 Dill. Corp., § 52 *et seq.*; Hood *v.* Lynn, 1 Allen (Mass.) 103; Tash *v.* Adams, 10 Cush. (Mass.) 252; Claflin *v.* Hopkins, 4 Gray (Mass.) 502; Murphy *v.* Jacksonville, 18 Fla. 318; Grant Co. *v.* Bradford, 72 Ind. 455; Henderson *v.* Covington, 14 Bush. (Ky.) 312; Cornell *v.* Guilford, 1 Den. (Ky.) 510; Hodges *v.* Buffalo, 2 Den. (N. Y.) 110; Halstead *v.* New York, 3 N. Y. 433; New London *v.* Brainard, 22 Conn. 552.

In Hodges *v.* City of Buffalo, 2 Denio (N. Y.), 110, the corporation by resolution had authorized a supper and ball to be given on the Fourth of July to entertain the citizens and certain invited guests; it was furnished, the bills sued for, and it was held that the persons furnishing could not recover, as there was no power in the city authorities to make such a contract, or pass such an ordinance. Express power was not given, and none could be implied from the words of the charter authorizing them "to pass such ordinances and by-laws for the good government and order of the city, and the trade and commerce thereof, as shall be necessary to carry into effect the powers given to the council." Such an appropriation of public money was held to be unauthorized.

In Bayland *v.* Mayor of New York, 1 Sandford (N. Y.), 29, where the corporation by resolution had called a meeting upon State and National affairs, it was held to be outside of the charter powers, the mere unauthorized act of the mayor and members of council, not a municipal or corporate act, and the city was liable for no portion of the expenses thereof.

In another case in the same State, the court observes: "To judge from the conduct of municipal corporations alone, we would conclude that there was no limitation of their powers, at least their power of expending money and laying taxes. Until the case of Hodges *v.* City

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of Buffalo was decided, nothing was more frequent than for city authorities to vote largess, and give splendid banquets for objects and purposes having no possible connection with the growth and well-being of the body politic, thus subjecting their constituency to unnecessary and expensive taxation. Since that decision it has generally been understood that their powers are more limited." It was therefore held, that where the corporation of the city attempted to vote money to indemnify their officers, fined and subject to costs for neglect of duty, which they were required by a city ordinance not to perform, such a vote of money was in violation of law, and entirely out of their power and jurisdiction. Halstead *v.* Mayor of New York, 3 Comstock (N. Y.) 433.

In Hood *v.* Lynn, 1 Allen (Mass.), 103, it was held that "a town cannot appropriate money to celebrate the Fourth of July," and no usage will justify it. In Tash *et al. v.* Treasurer of Natick, 10 Cush. (Mass.) 252, an expenditure of money to celebrate the surrender of Cornwallis was held unauthorized. In Lee *et al. v.* Town of Hopkinton, 4 Gray (Mass.), 502, it was held that a vote of money to purchase uniforms for an artillery company was unauthorized, and would be restricted by injunction even after the uniforms had been purchased upon the strength of the ordinance, and deposited in the armory of the company. In Stetson *v.* Kempton *et al.*, 13 Mass. 272, it was held that an appropriation of money to give additional wages to the militia in time of war and danger of hostile invasion was unauthorized.

In City of New London *v.* Brainard, 22 Conn. 522, the court said: "Corporations have only such rights and powers as are expressly granted to them, or as are necessary to carry into effect the rights and powers so granted. Therefore the city of New London has no power in its corporate capacity to appropriate money to celebrate Independence Day, and a taxpayer had a right to pray for an injunction ; and it is the proper remedy to restrain both the city and the treasurer." In Booth *v.* Town of Woodbury, 5 Am. L. R. (N. S.) 202, it was held that towns have no powers except such as are expressly granted to them by the legislative power of the State ; and therefore cannot grant annuities to men drafted for the military service of the United States.

See, further, Bergner *v.* City Council of Harrisburg (Com. Pleas Dauphin County), 1 Pearson (Pa.), 290 ; Murphy *v.* Jacksonville, 18 Fla. 318 ; Grant Co. *v.* Bradford, 72 Ind. 455 ; Cornell *v.* Guilford, 1 Denio (N. Y.), 510 ; Henderson *v.* Covington, 14 Bush. (Ky.), 312.

As to bonds—Jackson Co. *v.* Brush, 77 Ill. 59; McCoy *v.* Briant, 53 Cal. 247. Any citizen and taxpayer may prevent the issue and sale of void bonds by a municipal corporation. Johnson Co. *v.* McClintock, 51

Note

Ind. 325; Livingston Co. *v.* Weider, 64 Ill. 249; Allison *v.* Railway Co., 9 Bush. (Ky.), 247; Bound *v.* Railway Co., 45 Wis. 543; Wright *v.* Bishop, 88 Ill. 302; Cole *v.* Hanchett, 13 Ill. 615; Perry *v.* Kinnear, 42 Ill. 160; Drake *v.* Phillips, 40 Ill. 392; Beauchamp *v.* Supervisors, 45 Ill. 274; Marshall *v.* Silliman, 61 Ill. 218; Chestnut Wood *v.* Hood, 68 Ill. 132; Springfield *v.* Edwards, 84 Ill. 266.

Who Are Proper Parties in a Suit to Enjoin.—Generally speaking, any resident taxpayer, who need not prove special damages. In addition to cases already cited, see McCoy *v.* Briant, 53 Cal. 247; Washington *v.* Howard, 8 Cush. 66; Baltimore *v.* Gill, 31 Md. 375; Merrill *v.* Plainfield, 45 N. H. 126; Frederick *v.* Groshen, 20 Md. 436; Baltimore *v.* Porter, 18 Md. 284; New London *v.* Brainard, 22 Conn. 552; Barr *v.* Deniston, 19 N. H. 170; Douglas *v.* Placerville, 18 Cal. 643; Drake *v.* Phillips, 40 Ill. 388; Rice *v.* Smith, 9 Iowa 570; Grant *v.* City of Davenport, 36 Iowa, 396; Smith *v.* Majairick, 44 Ga. 163; Howell *v.* Peoria, 90 Ill. 104; But see Roosevelt *v.* Draper, 23 N. Y. 318; Doolittle *v.* Supervisors, 18 N. Y. 155.

The State is not a necessary party. Sheaman *v.* Carr, 8 R. I. 431; Newmeyer *v.* Missouri, 52 Mo. 81, 14 Am. Rep. 394, and *note*.

Gross laches, however, on the part of taxpayers which has involved innocent third persons in liability will prevent the granting of an injunction. Tash *v.* Adams, 10 Cush. 252; People *v.* Maynard, 15 Mich. 463; Stewart *v.* Kalamazoo, 30 Mich. 69. But those in whose favor the vote was made, though they incurred expenditures on the faith of it, are not third persons within the meaning of the principle. Claflin *v.* Hopkinton, 4 Gray (Mass.), 502; *cf.* New London *v.* Brainard, 22 Conn. 552; Hodges *v.* Buffalo, 2 Denio (N. Y.), 110.

For convenience a number of the cases in those States where the question seems to have been most frequently considered are given below in separate paragraphs.

Missouri.—Hooper *v.* Ely, 46 Mo. 505; Steines *v.* Franklin Co., 48 Mo. 167; Newmeyer *v.* M. & M. R. R. Co., 52 Mo. 81, 14 Am. Rep. 394; Railroad Co. *v.* McGuire, 49 Mo. 483; Ruby *v.* Shain, 54 Mo. 207; State *v.* Dowling, 50 Mo. 134; State *v.* Saline Co. Court, 51 Mo. 352; Dean *v.* Todd, 22 Mo. 92; Sayre *v.* Tompkins, 23 Mo. 443; Barron *v.* Davis, 46 Mo. 394; Leslie *v.* St. Louis, 47 Mo. 478. See, also, Raney *v.* Bader, 67 Mo. 476, where the State decisions are reviewed.

Pennsylvania.—Sharpless *v.* Mayor, 21 Pa. St. 147; Mercer Co. *v.* P. & E. R. R., 27 Pa. St. 404; Moers *v.* City of Reading, 21 Pa. St. 188; Mott *v.* P. R. R., 30 Pa. St. 9; Page *v.* Allen, 58 Pa. St. 338.

New York.—The decisions in this state seem to be conflicting. See Dillon Mun. Corp. § 920; Ketchum *v.* Buffalo, 14 N. Y. 356; Doolittle *v.* Supervisors, 18 N. Y. 155; Roosevelt *v.* Draper, 23 N. Y. 318;

Christopher *v.* Mayor, 13 Barb. 567; Milhau *v.* Sharp, 15 Barb. 195; Stuyvesant *v.* Pearsall, 15 Barb. 244; De Baun *v.* The Mayor, 16 Barb. 392; Wood *v.* Draper, 24 Barb. 187; Demarest *v.* Wickham, 63 N. Y. 320; Kilbourne *v.* St. John, 59 N. Y. 21, 17 Am. Rep. 291; Ayers *v.* Lawrence, 59 N. Y. 192; *In re* Mead, 74 N. Y. 216.

Massachusetts.—Hale *v.* Cushman, 6 Met. (Mass.) 425; Frost *v.* Belmont, 6 Allen, 152; Carlton *v.* Salem, 103 Mass. 141; Attorney-General *v.* Salem, 103 Mass. 138; Attorney-General *v.* Boston, 123 Mass. 460; Drury *v.* Natick, 10 Allen, 169.

Kansas.—Leavenworth *v.* Norton, 1 Kan. 259; Burnes *v.* Atchison, 2 Kan. 454; Craft *v.* Jackson Co., 5 Kan. 518; Spencer *v.* School Dist., 15 Kan. 259.

Minnesota.—Conklin *v.* Fellmore Co., 13 Minn. 454; Dawson *v.* Ins. Co., 15 Minn. 136; Hodgman *v.* Chic., etc., Ry. Co., 20 Minn. 48.

Illinois.—Colton *v.* Hanchett, 13 Ill. 615; Railroad Co. *v.* Blanchard, 54 Ill. 240; Sherlock *v.* Winnetka, 59 Ill. 389; Livingston Co. *v.* Weider, 64 Ill. 249; Perry *v.* Kinnear, 42 Ill. 160; Beauchamp *v.* Supervisors, 45 Ill. 274; Chestnut Wood *v.* Hood, 68 Ill. 132; Marshall *v.* Silliman, 61 Ill. 218; Springfield *v.* Edwards, 84 Ill. 266; Wright *v.* Bishop, 88 Ill. 302; Howell *v.* Peoria, 90 Ill. 104.

Iowa.—Rice *v.* Smith, 9 Iowa, 570; Grant *v.* City of Davenport, 36 Iowa, 396; Fleming *v.* Mershon, 37 Iowa, 413; Cornell College *v.* Iowa Co., 32 Iowa, 520.

Other States.—Place *v.* Providence, 12 R. I. 1; Folmer *v.* Nuckolls, 6 Neb. 204; Wade *v.* Richmond, 18 Gratt. 583; Sheaman *v.* Carr, 8 R. I. 431; Jager *v.* Doherty, 61 Ind. 528; Jackson Co. *v.* McClintock, 51 Ind. 325; Allison *v.* Railway Co., 9 Bush. (Ky.) 247; Bound *v.* Railroad Co., 45 Wis. 543; Elyton Land Co. *v.* Ayres, 62 Ala. 413; Corrathers *v.* Clinton Dist. Bd. of Ed., 16 W. Va. 527; Wilkerson *v.* Walters, 1 Idaho (N. S.), 564.

CALHOUN

v.

LITTLE.

(*Supreme Court of Georgia, Dec. 23, 1898.*)

Police Courts—Validity of Ordinance.*—The town of Waresboro derives its authority to exercise corporate functions from an act of the general assembly passed on December 9, 1893 (Acts 1893, p. 335), granting a new charter to such town. Under this act, an ordi-

*See note at end of case.

nance which confers upon the police court of the town authority to punish by imprisonment without giving persons convicted of offenses against the town an opportunity to pay a fine is void for want of authority in the town council to pass it.

Same—Judges—Exemption from Personal Liability.*—In all cases where judges of courts of general jurisdiction are exempt from civil liability in damages for their judicial acts, presiding officers of courts of limited jurisdiction are likewise exempt. (a) It follows, therefore, that where the presiding officer of a municipal court judicially determines that a given ordinance is valid, though in fact it is void for want of authority in the town council to pass it, he will not be liable in damages to a person convicted in his court of an offense against the town, and punished under such ordinance by imprisonment, without having been given an opportunity to pay a fine, provided the court in which such person is convicted has jurisdiction of the subject-matter of the offense.

Same—Same—Construction of Statute.—Where a section of the Code has been codified from a decision of this court, it will be construed in the light of the source from which it came, unless the language of the section imperatively demands a different construction. (a) Section 752 of the Political Code has no application to acts of a member of a town council when he is presiding in a police court which is authorized by the charter of the town.

Case at Bar.—The principles above announced control the case. There was no material error in the charges complained of. The evidence amply warranted the verdict, and there was no error in refusing a new trial.

(Syllabus by the court.)

Error by plaintiff from Ware county superior court. *Affirmed.*

Hitch & Myers, for plaintiff in error.
Leon A. Wilson, for defendant in error.

COBB, J. On June 26, 1896, Little, as mayor *pro tem.* of the town of Waresboro, tried Calhoun upon the charge of violating the following ordinance of the town: "It shall be unlawful for any person or persons to engage in fighting or riotous conduct within the corporate limits of the town of Waresboro, or resist or obstruct the marshal or any policeman while in the discharge of their official duties." The accused was convicted, and the following

Case Stated.

sentence was passed upon him: "After hearing the evidence in the above-stated case, it is ordered and adjudged by the court that the defendant be kept in the jail of the town of Waresboro for three days." It appears from the minutes of the town council that this sentence was afterwards commuted, by the officer who tried the accused, to imprisonment for one day. This sentence was passed pursuant to the following ordinance: "Any person who shall commit any or either of the offenses hereinbefore mentioned * * * shall on conviction for each offense be sentenced to pay a fine of not less than one dollar nor exceeding twenty dollars, or imprisonment and work on the public streets not exceeding thirty days." The ordinances herein quoted were passed in 1888. The present suit is an effort on the part of Calhoun to recover damages from Little on account of the alleged illegal detention of the plaintiff in the town jail. The petition alleges that the sentence above quoted was without authority of law, and that the imprisonment of petitioner thereunder was malicious and in violation of law; that petitioner had violated no ordinance of the town; and that the conviction and sentence was a willful and malicious persecution. The petition further alleges that efforts were made on the part of friends of petitioner to give bond or deposit any sum of money required to enable him to have the sentence reviewed and set aside, but that these efforts were unavailing. The defendant answered, denying that the sentence and imprisonment thereunder were malicious or without authority of law, and averred that his acts were in furtherance of law and order. The allegations in the petition as to efforts to give bond in order to have the sentence reviewed are also denied. At the trial the evidence showed that the defendant was regularly elected a member of the town council on June 22, 1896. From an extract of the minutes of the council it appears that the defendant was elected mayor *pro tem.* on July 6, 1896, but there was testimony showing that he was mayor *pro tem.* at the date of the trial of the plaintiff, for the alleged violation of the ordinance of the town. The defendant testified that no

bond was ever offered him either by Calhoun or by any one in his behalf. The jury returned a verdict for the defendant, and, plaintiff's motion for a new trial being overruled, he excepted.

1. Were the ordinances under which the plaintiff in error was convicted and sentenced to imprisonment by the defendant valid at the time of the trial? These ordinances were passed under authority of a charter granted to the town by the superior court, the provisions of which charter will be found in sections 685–710 of the Political Code. An examination of these provisions will show that the ordinances were valid at the time of their passage. In 1891 an act was passed prohibiting the general assembly from granting charters to towns of less than 2,000 inhabitants, and conferring upon the superior courts exclusive power to grant such charters. Acts 1890–91, p. 190. This act was repealed on December 1, 1893. Acts 1893, p. 65. In the case of Fullington *v.* Williams, 98 Ga. 807, 27 S. E. 183, this act was held to be constitutional and valid. On December 9, 1893, a new charter was granted the town of Waresboro by the general assembly. Acts 1893, p. 335. This act has never been repealed either expressly or by implication, nor has its validity been in any way impaired. From it, therefore, the town of Waresboro must derive whatever authority it has to exercise corporate functions. This act repeals all former charters granted to the town, but provides that all ordinances then in force, and not inconsistent with its provisions, shall be valid and of force until amended or repealed by the mayor and aldermen of the town. An examination of the act will show that the ordinance which defined the offense for which Calhoun was tried is perfectly consistent with its provisions. Is the ordinance which prescribes the punishment to be inflicted upon persons convicted of offenses against the town also consistent with the provisons of the act? Section 11 of the act is as follows: "Be it further enacted, that the mayor or mayor *pro tem.* of said town shall hold a police court in said town at any time for the trial and

punishment of all violators of their ordinances, by-laws, rules and regulations of said town, the punishment inflicted not to exceed a fine of one hundred dollars, or in default of the payment of said fine and costs, by labor on the streets of said town or public works of said town not to exceed sixty days, or confinement in the common jail of the said town not to exceed sixty days." It needs no argument to show that an ordinance of the town which allows imprisonment without first giving the person convicted an opportunity to pay a fine is rendered void by this section of the act.

Police Courts—Validity of Ordinance.

2. The question therefore arises: Is the defendant liable to the plaintiff in damages for inflicting a punishment upon him under a void ordinance? The court over which the defendant presided had jurisdiction of the person of the plaintiff, and jurisdiction to try and punish him for the offense with which he was charged. The defendant has only exceeded his authority in fixing the punishment. It is universally conceded that judges of courts of superior and general jurisdiction are exempt from liability in damages for judicial acts, even when such acts are in excess of their jurisdiction. This doctrine has become firmly fixed in the jurisprudence of both England and the United States. Upon its strict application depends, to a very great extent, the usefulness of courts, and the fearless and impartial administration of justice. See Broom, Comm. pp. 103–106; 7 Am. & Eng. Enc. Law, 668; Pratt *v.* Gardner, 2 Cush. 63; 2 Hil. Torts, p. 161; Cooley, Torts, p. 472 *et seq.*; Bish. Noncont. Law, § 781; Randall *v.* Brigham, 7 Wall. 523; Bradley *v.* Fisher, 13 Wall. 335.

Same—Judges—Exemption from Personal Liability.

But it is said that the law affords no protection to presiding officers of inferior courts when they exceed their jurisdiction. Piper *v.* Pearson, 2 Gray, 120; Vanderpool *v.* State, 34 Ark. 174; Tracy *v.* Williams, 4 Conn. 107; 7 Am. & Eng. Enc. Law, 669. JUDGE COOLEY, after stating that there is a distinction as to liability for judicial acts between judges of courts of general and

Same—Same—Construction of Statute.

those of limited jurisdiction, gives as the reasons for this distinction the following: "The inferior judicial officer is not excused for exceeding his jurisdiction because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. The rule of law, therefore, which compels him to keep within his jurisdiction at his peril, cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty by doing so. Moreover, in doing so he keeps within the presumptions of law, for these are always against the rightfulness of any authority in an inferior court, which, under the law, appears doubtful." Cooley, Torts, p. 491. We are unable to appreciate the force of the reasons embodied in the above quotation, which contains all the arguments we have been able to find in favor of the distinction. On the other hand, we quite agree with the supreme court of Iowa when it says, in Thompson *v.* Jackson (Iowa) 27 Lawy. Rep. Ann. 92, 95 (s. c. 61 N. W. 1006), that, "after an exhaustive examination of the cases which make this distinction, we have to say that we do not think they are founded upon grounds which can be sustained by any logical or reasonable argument." In the case just referred to, it was held that "a justice of the peace, like judges of the superior courts, is protected from personal liability for judicial acts in excess of his jurisdiction, if he acted in good faith, believing he had jurisdiction." MR. BISHOP, in his work on Noncontract Law (section 783), commenting upon this distinction, says: "But, in reason, if judges properly expected to be most learned can plead official exemption for their blunderings in the law, *a fortiori* those from whom less is to be expected, and who receive less pay, should not be compelled to respond in

damages to their mistakes honestly made after due carefulness." And this, we think, is a complete answer to all of the reasons given why such distinction exists. In Bell *v.* McKinney, 63 Miss. 187, it was held that where a magistrate had authority to require a person brought before him to give bond to appear at the circuit court, but under an erroneous judgment as to the extent of his authority, and in good faith, tried such person, and upon his conviction sentenced him to pay a fine or be imprisoned, the magistrate was not liable in damages to the person aggrieved. In the case of Henke *v.* McCord, 55 Iowa, 378, 7 N. W. 623, the facts were almost identical with those in the present case. It was there held that "a justice of the peace who enforces an ordinance which is void for want of power in the city to enact it cannot be held liable therefor in a civil action." The distinction between the liability of presiding officers of inferior and those of superior courts is mentioned, but it was not necessary to decide whether or not the distinction was rational. We have seen, however, that this same court, in a more recent case, declared in very vigorous terms that the distinction was utterly illogical. In Brooks *v.* Mangan, 86 Mich. 576, 49 N. W. 633, it was held that a justice of the peace who, in the exercise of his honest judgment, holds an unconstitutional ordinance constitutional, is not liable for such an error of judgment. In the opinion, GRANT, J., uses this language: "These inferior tribunals should be left to the exercise of their honest judgment, and, when they have so exercised it, they are exempt from civil liability for errors." In Clark *v.* Holdridge, 58 Barb. 61, it was held that a justice of the peace who inflicted a larger fine than the law required would be protected by the principle of judicial irresponsibility. See, also, McCall *v.* Cohen, 16 S. C. 445; Scott *v.* Fishblate (N. C.) 23 S. E. 436; Lange *v.* Benedict, 29 Am. Rep. 80; Austin *v.* Vrooman (N. Y. App.) 28 N. E. 477.

These decisions settle, we think, beyond doubt, that no good reason exists in law why presiding officers of inferior courts should not be measured by the same rules

with respect to liability for their judicial acts as judges of courts of general jurisdiction. We must not be understood, however, as ruling that these officers have immunity from civil liability in all cases. As was said in Bradley *v.* Fisher, 13 Wall. 335, 352: "Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." But all judicial officers stand on the same footing, and must be governed by the same rules. It follows from what has been said that where the court has jurisdiction of the subject-matter of the offense, and the presiding officer erroneously decides that the court has jurisdiction of the person committing it, or commits an act in excess of his jurisdiction, he will not be liable in a civil action for damages. But, where there is a clear absence of jurisdiction over the subject-matter, the officer will be liable for exercising it, provided such want of jurisdiction is known to him. There is nothing in section 3852 of the Civil Code to conflict with the ruling made in the present case. That section is as follows: "If the imprisonment is by virtue of a warrant, neither the party *bona fide* suing out, nor the officer who in good faith executes the same, is guilty of false imprisonment, though the warrant be defective in form, or be void for want of jurisdiction. In such cases the good faith must be determined from the circumstances of each case. The same is true of the judicial officer issuing the warrant, the presumption being always against him as to good faith, when he has no jurisdiction." The section seems to provide that a judicial officer who in bad faith issues either a defective or a void warrant will be liable in an action for false imprisonment, at the instance of the person imprisoned thereunder. It is, however, limited by its very terms, not only to an act done out of court, but one which, though to some extent judicial, is largely ministerial in its nature; and in no event can it have any application to the acts of a

judicial officer while presiding in court, and, as a court, in passing upon a question involving the jurisdiction of this court, and which he is bound to decide.

In the present case, the court over which the defendant in error presided had jurisdiction of the subject-matter of the offense, and of the person of the plaintiff in error. The sentence was passed pursuant to a void ordinance, it is true; but on the defendant in error, in the first instance, was cast the duty of determining whether or not this ordinance was valid. Acting in a judicial capacity, he, in effect, decided that the ordinance was valid. True, the question was not directly made before him, but he necessarily held it to be valid, because this was the only source from which he could derive his authority. To hold that he was liable in a civil action for damages for erroneously deciding that this ordinance was valid would be, in effect, to hold that the law makes it the duty of an officer to decide a question, and then punish him for not deciding it correctly. The law never does this. The presiding officer of a court clothed with authority to decide questions of law which may come before it will be protected in the exercise of this authority, however erroneous the decision might be. It is far better for a few innocent persons to suffer than for the ends of justice to be thus hampered.

3. It is contended, however, by counsel for the plaintiff in error, that section 752 of the Political Code makes a different rule applicable to the defendant in error. That section is as follows: "Members of the council and other officers of a municipal corporation are personally liable to one who sustains special damages as the result of any official acts of such officer, if done oppressively, maliciously, corruptly, or without authority of law." By reference to the margin of the page on which this section appears, it will be seen that it is codified from a decision of this court. Unless the language of the section imperatively requires a different construction, it will be presumed that the general assembly,

in adopting it, intended merely to adopt the principle of law announced in the decision from which it is taken. See, in this connection, Suth. St. Const. § 300. The decision from which the section is codified is Pruden *v.* Love, 67 Ga. 190. In that case it appears that the town counsel, at a meeting appointed for that purpose, and of which the plaintiff (Love) had no notice, condemned as a nuisance the house of the plaintiff, and had it torn down, without giving him a hearing. The court held that for this act the members of the town council were personally liable in damages to the owner of the building. CHIEF JUSTICE JACKSON, in the opinion, says: "Whilst, therefore, we hold, with the judge below, that the mayor and council could not be held personally liable unless they acted either maliciously, corruptly, oppressively, or without authority of law, yet we agree with him, too, in the opinion, evinced by his denial of a new trial, that there is sufficient evidence to uphold a verdict that they did act without complying substantially with the law in a most essential element of a fair trial,—notice of time and place,—and thereby acted so as to oppress the defendant in error. The mayor and council in that case were not a court, and were not held liable because, when sitting as a court, they made an erroneous decision. The section of the Code, it will be noticed, uses the expression "official acts," and can have no application to a member of a town council when presiding as a judge over the police court of the town.

4. It is not necessary to express any opinion as to whether or not the defendant in error would have been liable for a refusal to accept a valid bond tendered by the plaintiff in error for the purpose of having the decision reviewed, as the evidence on this point was conflicting, and no ruling of the trial judge on this point was excepted to. Under the views above expressed, if any errors were committed by the presiding judge in charging the jury, such errors were immaterial. Judgment affirmed. All the justices concurring.

Case at Bar.

NOTES

Fines and Imprisonment.—Cities, towns, and villages, whether incorporated under general or special acts of the legislatures are commonly authorized by their charters to provide for the imprisonment of offenders against their ordinances, until the fines and costs adjudged against them by judicial authority are paid. Sheffield *v.* O'Day, 7 Ill. App. 339; Mayor of Bayonne *v.* Herdt, 40 N. J. L. 264. See State *v.* Ruff, 30 La. Ann. 497.

The imprisonment which the court is authorized to inflict is for a failure or refusal to pay the fine, and is not by way of punishment to the offender for the offence committed. Sheffield *v.* O'Day, 7 Ill. App. 344; Inwood *v.* State, 42 Ohio St. 186; Mayor of Bayonne *v.* Herdt, 40 N. J. L. 264.

Imprisonment as a punishment can be inflicted by a municipal corporation only when the power is given by the charter. Burlington *v.* Kellar, 18 Iowa 59.

The power to imprison never arises by implication. Horr & Bemis, § 158; Burlington *v.* Kellar, 18 Iowa 59; City of London's Cas., 8 Coke 187; Clark's Cas., 5 Coke 64.

Personal Liability of Judicial Officer for Enforcement of Unconstitutional Statute.—In several decisions it has been held that a magistrate was liable for acting under a statute which after his action thereunder was decided to be unconstitutional. Kelly *v.* Bemis, 4 Gray (Mass.) 83; Sumner *v.* Beeler, 50 Ind. 341; Monroe *v.* Collins, 17 Ohio St, 665. *Compare* Astrom *v.* Hammond, 3 McLean (U. S.) 107; Woolsey *v.* Dodge, 6 McLean (U. S.) 142; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) at p. 738, 868; Meagher *v.* Storey Co., 5 Nev. 244.

A justice of the peace was held liable in *Kentucky*, for ordering the arrest and lashing of a free person of color under an act authorizing, *inter alia*, such persons to be so treated should they lift up their hand in opposition to any white person, said act having, for one thing, been repealed; and, again, being unconstitutional. Ely *v.* Thompson, 3 A. K. Marsh. (Ky.) 76.

But see, *contra*, Henke *v.* McCord, 55 Iowa 378, 385. And see State *v.* McNally, 34 Me. 221; Sessums *v.* Botts, 34 Tex. 335.

CITY OF NEW ALBANY

v.

SLIDER.

(*Appellate Court of Indiana, Jan. 10, 1899.*)

Municipal Corporations—Nuisances—Liability.*—The same liability attaches against a municipal corporation for a nuisance maintained upon its property as against an individual under such circumstances.

Public and Private Nuisances.—A public nuisance may become a private nuisance by inflicting upon a particular individual some special or peculiar damage.

Same.*—Where, in cleaning streets, garbage is collected from streets and deposited upon some other street, to the special injury of an individual, such person may recover damages in an action against the city.

Contributory Negligence.—The fact that plaintiff contributed to the injuries resulting from such a collection of garbage, by depositing filth in the vicinity, will not preclude a recovery in such an action.

Instructions.—It is not error to refuse to give requested instructions upon a point fully covered by an instruction already given, to which there is no objection.

Assignments of Error.—Where it is merely alleged that there was error in refusing certain numbered instructions, the objection must be overruled if it appears that either one of such instructions was properly refused.

Removal of Nuisance—Prior Damage.—A city may be liable, after the removal of a nuisance, for prior damage to plaintiff's property caused by the maintenance of the nuisance.

Joint Tort-Feasors—Liability.—Where two persons contribute to a wrong, either may be held liable.

Assignments of Error—Review.—Assignments of error which question the action of the court in giving, and in refusing to give, certain instructions present no question for review, but should be stated as causes in a motion for a new trial.

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*See notes at end of case.

City of New Albany *v.* Slider

APPEAL by defendant from Floyd county circuit court. *Affirmed.*

George H. Hester, for appellant.
Kelso & Kelso, for appellee.

ROBINSON, J. In appellee's complaint he alleges that he is the owner, and, with his family, is in possession, of a house and lot in the city of New Albany as a residence; that said city has caused to be deposited large quantities of garbage, rubbish, and filth, gathered off its public ways, near to the premises of appellee, thereby creating a nuisance consisting of a huge pile of decomposed and decaying vegetable and animal matter, from which noxious vapors, and disagreeable and unhealthy odors are generated and emitted, whereby the air in and about said premises of appellee was impregnated, injuring appellee's health, and causing him and his family to become diseased and sick, destroying the comfortable enjoyment of said premises, and greatly depreciating the value thereof, to appellee's damage. The sufficiency of the complaint is questioned by the first and second assignments of error. It is argued that in the collection of garbage and removing it from its streets and alleys the city was exercising the authority conferred upon it by the legislature; that in exercising such powers the city stood in the place of the state; and that, as the state assumes no responsibility in the discharge of its governmental duties, the city, as a branch department of the state, likewise assumes no liability in the discharge of such duties. This argument resolves itself into the question whether a city can create an actionable nuisance. Our statute defining special causes of action says: "Whatever is injurious to health or indecent or offensive to the senses so as to essentially interfere with the comfortable enjoyment of life or property, is a nuisance, and subject to an action." Rev. St. 1894, § 290 (Horner's Rev. St. 1897, § 289). "Such action may be brought by any person where property is injuriously affected, or where personal enjoyment is lessened

Case Stated.

by the nuisance." Rev. St. 1894, § 291 (Horner's Rev. St. 1897, § 290). The rule seems to be well recognized that a municipal corporation is liable for torts, the same as an individual, in certain classes of cases, among which are included nuisances. Thus, in 2 Add. Torts (Dud. & B. Ed.) p. 1315, it is said: "A municipal corporation has no more right to maintain a nuisance than an individual would have, and for a nuisance maintained upon its property the same liability attaches against a city as to an individual." This rule was recognized as correct in Haag *v.* Board, 60 Ind. 511. See 2 Hil. Torts (4th. Ed.) 387, 388; Stein *v.* City of Lafayette, 6 Ind. App. 414, 33 N. E. 912; City of Valparaiso *v.* Moffitt, 12 Ind. App. 250, 39 N. E. 909.

Municipal Corporations—Nuisances—Liability.

It is further argued that the complaint is defective, because it seeks private redress for a public nuisance. It may be true, the complaint describes a public nuisance, but it also contains allegations showing special injury to appellee. The statute in such cases gives any one where property is injuriously affected, or where personal enjoyment is lessened, a right of action. The averments of the complaint as set out above are sufficiently full to show an injury personal to appellee. A public nuisance may become a private nuisance by inflicting upon a particular individual some special or peculiar damage.

Public and Private Nuisances.

The third error assigned is overruling appellant's motion for judgment on the interrogatories notwithstanding the general verdict. The fact that, as shown by the answers to the interrogatories, the city committed the acts complained of in an effort to keep its streets clean for the benefit of the public, does not destroy appellee's right to redress because he is one of the public for whose benefit the work was done. Cleaning the city's streets may have been a proper exercise of power delegated by the state to the municipality, but, under the authorities above cited, this did not give it the right to create a nuisance. A city has exclusive power over streets within the corporate limits, and the cleaning of its streets,

when duly exercised, cannot be controlled by the courts. In such work, if unavoidable injury results, no liability ensues, because the doing of what the law authorizes cannot be a nuisance so as to give a right of action. But collecting garbage and filth from the streets, and depositing it in a mass upon some other street, may create a nuisance; and, if it does, the city must respond in damages.

Same.

It is further argued that the answers to the interrogatories show that appellee was guilty of such contributory negligence as would bar his recovery. There is nothing in the answers which shows that appellee in any way contributed to establishing and maintaining the particular nuisance complained of. It is true, the jury find that appellee deposited garbage and filth upon another street and another place, and that this filth aided in causing and creating bad odors and noxious vapors in and around said street, and that such odors were of such a nature as to produce sickness, but that it was not the chief cause of the sickness of appellee and family. It is not shown that these deposits by appellee interfered with the comfortable enjoyment by appellee and his family of his home and premises, or lessened its rental value, but that the odors from the deposits by the city did. The general verdict of the jury for $50 may have been based upon these alone. Besides, where a person contributes to a nuisance, and his acts alone might not amount to a nuisance, he may be chargeable therewith, although others contribute thereto. In such cases, if the combined effect is to produce an actionable injury, an action may be maintained against each of the parties contributing. It is always competent to show that others contributed to the wrong, not for the purpose of defeating the action, but in mitigation of damages. The commission of a wrongful act is not excused by the fact that others contributed to it. Taking all the answers to the interrogatories, and construing them together, we do not find such an irreconcilable conflict with the general verdict

Contributory Negligence.

as would warrant a judgment on the interrogatories notwithstanding the general verdict.

The fourth error assigned is overruling appellant's motion for a new trial. The third cause for a new trial is, "The court erred in refusing instructions numbered 7, 8, and 9 asked by defendant." It is argued that these instructions should have been given, because they correctly state the law relative to the measure of damages. The court fully instructed the jury upon that question in the instruction given, to which appellant has offered no objections in his brief. Besides, when the action of the court in refusing to give instructions is presented as above, if it appears that either one of the instructions asked was properly refused, no error was committed. Railway Co. *v.* McCartney, 121 Ind. 385, 23 N. E. 258; Douglass *v.* State, 18 Ind. App. 289, 48 N. E. 9; Mock *v.* City of Muncie, 9 Ind. App. 536, 37 N. E. 281; Sutherlin *v.* State, 108 Ind. 389, 9 N. E. 298; Grant *v.* Westfall, 57 Ind. 121.

Instructions.

Assignments of Error.

There was no error in refusing to give the eighth instruction requested, which told the jury, in substance, that, if the evidence showed that appellant created the nuisance, and that appellee did not contribute to the same, and that the nuisance had been removed, and does not now exist, then the jury could not consider the effect it had on the value of appellee's property while it existed, and he could not recover.

Removal of Nuisance—Prior Damage.

The fourth cause for a new trial was modifying the eleventh instruction requested by appellant, and giving the same as modified. The modification made by the court was adding to the instruction a statement, the legal effect of which is that, where two persons contribute to a wrong, either may be held liable. Under the authorities above cited, this modification was not error.

Joint Tort-Feasors—Liability.

The fifth, sixth, seventh, eight, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth errors assigned question

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the action of the court in giving certain instructions and refusing to give certain instructions requested by appellant. The rule is well settled that these assignments present no question for review. They should be stated as causes in a motion for a new trial, but cannot be assigned as independent errors. Baecher *v.* State, 19 Ind. App. 100, 49 N. E. 42, and cases there cited.

Assignments of Error—Review.

The fifteenth and sixteenth errors assigned question the court's action in sustaining the demurrer to the third and fourth paragraphs of answer. It is stated by appellant's counsel, in his brief, that these answers set up the fact that the acts resulting in a nuisance were done by the city under its statutory and police power, for which appellant is not liable. What we have already said in discussing the complaint applies to these answers, and it is not necessary to repeat what was there said. There is no error in the record, and the judgment is affirmed.

NOTES.

Liability of Municipality for Maintaining Nuisance.—The same liability for the creation and maintenance of a nuisance attaches against a municipal corporation as against a natural person. Hagg *v.* Board of Comm'rs of Vanderburgh Co., 60 Ind. 511, 28 Am. Rep. 664; Judge *v.* Meriden, 38 Conn. 90; Mootry *v.* Danbury, 45 Conn. 550, 29 Am. Rep. 703; Hannibal *v.* Richards, 82 Mo. 330; Fort Worth *v.* Crawford, 74 Tex. 404, 62 Tex. 202, 8 Am. & Eng. Corp. Cas. 406; Suffolk *v.* Parker, 79 Va. 660, 52 Am. Rep. 640; Harper *v.* Milwaukee, 30 Wis. 365; Pennoyer *v.* Saginaw, 8 Mich. 534; Petersburgh *v.* Applegarth, 28 Gratt. (Va.), 321, 26 Am. Rep. 357; Haskell *v.* New Bedford, 108 Mass. 208; Brayton *v.* Fall River, 113 Mass. 218, 18 Am. Rep. 470; Boston Rolling Mills *v.* Cambridge, 117 Mass. 396; Breed *v.* Lynn, 126 Mass. 367; State *v.* Mayor, etc., of Knoxville, 12 Lea (Tenn.), 146, 5 Am. & Eng. Corp. Cas. 385; Niblett *v.* Nashville, 12 Heisk. (Tenn.), 684, 27 Am. Rep. 755; Spokes *v.* Banbury, L. R., 1 Eq. 42; Sherman *v.* Langham (Tex. 1890), 30 Am. & Eng. Corp. Cas. 539; Atty. Gen. *v.* Birmingham, 4 K. & J. 528. As to enjoining city from collecting sewage, see Chapman *v.* Rochester, 110 N. Y. 273.

But a town is not liable for acts which result in creating a nuisance to the property of one of its citizens, when the acts complained

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of are not within the scope of its corporate powers. Seele *v.* Deering, 79 Me. 343.

Nor can an action be maintained against a town for maintaining a nuisance in the nature of a defective culvert of which it has no knowledge. Morse *v.* Fair Haven East, 48 Conn. 220.

And an action cannot be maintained against the authorities of a town, upon an allegation that a regularly licensed liquor seller was permitted to keep a saloon near the plaintiff's house in such a manner as to constitute it a nuisance. McCrowell *v.* Bristol, 5 Lea (Tenn.), 685.

Same—Action for Nuisance Caused by Deposit of Garbage.—In City of Fort Worth *v.* Crawford, 74 Tex. 404, which was an action against a city for damages for injuries caused by the deposit of garbage, etc., on land adjacent to the plaintiff's home, the court held that the city was liable for creating such a nuisance; and that in order to raise such liability it was essential that the noxious smells arising from such garbage produce physical discomfort such as would interfere with the enjoyment of the property but need not be hurtful or unwholesome. In this case the control and possession of the lot by the city so as to make it liable for the nuisance committed was held to be shown by evidence of an ordinance designating such lot for the place of deposit of garbage, etc., and that the city took possession of the lot and prohibited its use by others, and directed the city scavengers to deposit the filth on the lot.

In Hill *v.* Mayor, etc., of City of New York, 139 N. Y. 495, 43 Am. & Eng. Corp. Cas. 556, it was held that the New York Consolidation Act, section 728, authorizing the commissioner of street-cleaning to procure tugs necessary for his work, and requiring the authorities having control of public piers to set apart suitable docks for the use of the street commissioner, and investing the said commissioner with authority to lease piers, wharves, etc., necessary for his purposes, did not contemplate the selection of half a pier so as to expose the private owner of the other half to inevitable injury, by reason of the erection of a dumping-board to facilitate the transfer of the refuse to the scows, and the further use of the pier as a storehouse for scavengers' refuse selected from the sweepings, where there resulted to the said private owner the further injury of being excluded from the use of his half of the dock on account of the obstruction to the entrance caused by the continual passage of the commissioner's dumping-carts; and the defendant should be restrained from such use of the said dock for the further reason that the permanent structure erected thereon prevented the public use of the pier.

HOLDER

v.

CITY OF YONKERS.

(*Supreme Court, Trial Term, Nov. 1898.*)

Contracts—Authority of Officers.—Where it appears that a lease to a city was executed by its proper officers, under its seal, and ratification and occupation under the lease is shown, it must be *held* that they were authorized to execute the lease.

Parks—Leases—Powers.—A city, in the absence of statutory authority, cannot take a lease of land for park purposes.

Same—Same—Same.—Such power is not conferred upon a city by a charter provision merely authorizing the acquisition of land for park purposes as local improvements by local assessment.

Municipal Corporations—Ultra Vires.*—An *ultra vires* contract entered into in behalf of a city by its duly authorized officers, will not be enforced against the city, even after it has enjoyed the benefits thereof.

Parks—Leases—Powers.—A charter provision authorizing defendant to purchase or lease lands for city purposes does not confer upon it the power to lease land for park purposes; the power conferred by such provision applying only to the purposes expressly stated in other parts of the charter.

Joseph F. Daly, for plaintiff.
James M. Hunt, for defendant.

JOHNSON, J. This is an action to recover the money stipulated to be paid as rent by an instrument annexed to the complaint. The instrument, purporting to be a lease, is in due form, and, according to its letter, the defendant is clearly liable to the plaintiff for 1½ year's rent, amounting to $2,250. The paper is executed by the mayor and city clerk, and is under the city's seal. The city now contends that the formal and necessary authority by which alone those officers could make such a contract was not given. I decide against the city on that

Contracts—Authority of Officers.

*See note at end of case.

point. It seems to me that the formal resolutions and proceedings were sufficient; besides, ratification and occupation under the lease are clearly shown. The paper itself, including the formal and usual affidavit or proof required by the recording act, was presumptive proof of its own validity. Jourdan *v.* Railroad Co., 115 N. Y. 380, 384, 385, 22 N. E. 153; Trustees *v.* McKechnie, 90 N. Y. 618.

That brings me to the more difficult question in the case. The lease expressly provides that the land demised "shall be used only for the purpose of a public park in the city of Yonkers," and contains a covenant that the city shall pay to the landlord—that is, to the plaintiff—the annual rental of $1,500. The remaining question is, had the city of Yonkers the power to make such a contract, its legislative and administrative officers all properly co-operating so to do? It is well settled that cities are corporations, having only such powers as are expressly granted or are fairly implied, or which are essential to the declared objects of the corporation. 1 Dill. Mun. Corp. § 89. We have national parks, county, city, and village parks, and in some cases parks built and paid for at the expense of and for a locality specially bounded and defined for that purpose. Considerable research, previously made, has convinced me that all such parks were acquired and are maintained under express provisions of statute law. Probably among the oldest parks in this country are the public squares or parks, which are very common in many states, at the county court house and around the public county buildings. But, even for such public squares, statutory authority seems to have been expressly given in this state. 1 Rev. St. p. 364; 1 Rev. St. (Edm. Ed.) p. 371, § 1. I doubt whether a case can be found where a municipal corporation has acquired, purchased, or maintained a public park or square other than under statutory authority. I think it must be held that the city of Yonkers had no power to lease the land in question for park purposes, or to make the contract here in question, unless such power affirmatively appears. Some of the cases

Parks—Leases—Powers.

cited to sustain the contrary rule arose on a question of constitutional, rather than of statute, law. There can be no question but that the building of a bridge, or the acquiring or maintaining of a park, are so far city purposes that a statute authorizing a city to build a bridge or acquire a park is constitutional. It certainly would be competent for the legislature to authorize the city of Yonkers to acquire this or any other land for park purposes, and probably to pay the fair value of the use already had of this land. But none of the authorities cited go to the extent of holding that any power to acquire or maintain parks is inherent or exists in any city, apart from the enabling power of statute law.

I am referred to section 2 of title 7 of the charter of the city of Yonkers as authorizing this lease. I do not understand that public parks are mentioned or referred to in the charter except in that or the connected sections. Those sections certainly do not authorize the acquisition of lands for park purposes except as local improvements and by the power of local assessment. I do not find in that title any power to acquire any land for park purposes in any other way, and certainly no power to so acquire by purchase or lease, at the expense of the entire city and as a general charge. That system of statute law seems to be practically like that discussed in Beard *v.* City of Brooklyn, 31 Barb. 142; in Richardson *v.* Same, 34 Barb. 577; and in Reilly *v.* City of Albany, 40 Hun, 413. To my view, the provisions of title 7 do not contemplate that the city of Yonkers shall purchase or acquire lands for park purposes at the general expense and as a general charge; and, in case a park were acquired under that title, I think it clear that the city could only be held liable for negligence or misfeasance in the performance of its duties in such a proceeding as such duties are there stated and defined. Beard *v.* City of Brooklyn, *supra*. It may well be that if the city, proceeding under the provisions of title 7, would have become obligated as a corporation to pay for a park so acquired, the principle involved by the learned

Same—Same—Same.

Municipal Corporations—Ultra Vires.

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counsel for the plaintiff would apply, and that the severe rule, held as to *ultra vires* contracts, would not be applied in this case. But, as I have said, I find nothing in the charter of the city of Yonkers authorizing it to be or become indebted by any proceedings or in any manner for land acquired or taken for the purposes of a public park. The United States courts have stated a rule as to municipal corporations which places them largely in the position of private corporations or of individuals as towards officers or agents. But the rule of the United States courts as to the liability of municipal corporations has not been adopted by the courts of this state. Walton *v.* City of New York, 26 App. Div. 76, 49 N. Y. Supp. 615; McDonald *v.* Mayor, etc., 68 N. Y. 23; Donovan *v.* Mayor, etc., 33 N. Y. 291; Lyddy *v.* Long Island City, 104 N. Y. 218, 10 N. E. 155.

The provision contained in section 11 of title 6, authorizing the city to purchase or lease lands for city purposes, does not help the plaintiff. If the city could purchase lands for park purposes, it could doubtless lease them, and I lay no stress upon the fact that the money here in suit is claimed under a lease, and not upon a sale of lands. I think that general power contained in section 11 must be limited to the purposes stated in other parts of the charter, and that such power is given merely as a means of executing the power otherwise and elsewhere granted. I find that the contract in suit was beyond the power of the defendant corporation, and that the defendant is entitled to judgment.

Parks—Leases—Powers.

Judgment for defendant.

NOTE.

Municipal Corporations—Ultra Vires Contracts.—The duties and powers of the officers and agents of a municipal corporation are prescribed by statute, and every person dealing with them may know and is charged with knowledge of the nature of these duties and extent of these powers. Clark *v.* Des Moines, 19 Iowa 199; McDonald

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v. Mayor, etc., of N. Y., 68 N. Y. 23, 23 Am. Rep. 144; Hodges *v.* Buffalo, 2 Den. (N. Y.) 110; Cornell *v.* Guilford, 1 Den. (N. Y.) 510; The Floyd Acceptances, 7 Wall. (U. S.) 666; Merchants' Bank *v.* Bergen Co., 115 U. S. 384; Sutro *v.* Pettit, 74 Cal. 332, 5 Am. St. Rep. 442; Wallace *v.* Mayor, etc., of San Jose, 29 Cal. 181; Schumm *v.* Seymour, 24 N. J. Eq. 143; Lowell Savings Bank *v.* Winchester, 8 Allen (Mass.) 109; Dorsey Co. *v.* Whitehead, 47 Ark. 205; Barton *v.* Swepston, 44 Ark. 437; Union School Township *v.* First National Bank, 102 Ind. 464; Bloomington School Township *v.* National School Furnishing Co., 107 Ind. 43; Axt *v.* Jackson School Township, 90 Ind. 101; Platter *v.* Elkhart Co., 103 Ind. 360; Reeve School Township *v.* Dodson, 98 Ind. 497; Summers *v.* Daruss Co., 103 Ind. 262; Pine Civil Township *v.* Huber Mfg. Co., 83 Ind. 121; Johnson *v.* Common Council of Indianapolis, 16 Ind. 227; Alton *v.* Mulledy, 21 Ill. 76; Chicago *v.* Shober, etc., Co., 6 Bradw. (Ill.) 560; Cleveland *v.* State Bank of Ohio, 16 Ohio St. 236, 88 Am. Dec. 445; Craycraft *v.* Selvage, 10 Bush (Ky.) 708; Perkinson *v.* St. Louis, 4 Mo. App. 322. See also authorities cited *infra*.

It follows, therefore, that the agents, officers or even the city council of a municipal corporation cannot bind it by any act which transcends their lawful or legitimate powers; and a municipal corporation may set up a plea of *ultra vires*, or its own want of power under its charter or constituent statute, to enter into a given contract or to do a given act in excess of its corporate power and authority. Stidger *v.* Red Oak, 64 Iowa 465, 5 Am. & Eng. Corp. Cas. 511; Sioux City *v.* Weare, 59 Iowa 95; State *v.* Haskell, 20 Iowa 276; Clark *v.* Des Moines, 19 Iowa 199; McPherson *v.* Foster, 43 Iowa 48; Clark *v.* Polk Co., 19 Iowa 248; Carpenter *v.* Union, 58 Iowa 335; Estep *v.* Keokuk Co., 18 Iowa 199; Mayor, etc., of Nashville *v.* Ray, 19 Wall. (U. S.) 468; Whiteside *v.* United States, 93 U. S. 247; Marsh *v.* Fulton Co., 10 Wall. (U. S.) 676; The Floyd Acceptances, 7 Wall. (U. S.) 666; Thomas *v.* Richmond, 12 Wall. (U. S.) 339; Hayes *v.* Holly Springs, 114 U. S. 120; McClure *v.* Oxford Township, 94 U. S. 429; Knox Co. *v.* Aspinwall, 21 How. (U. S.) 539; East Oakland *v.* Skinner, 94 U. S. 255; Harshman *v.* Bates Co., 92 U. S. 569; Lewis *v.* Shreveport, 103 U. S. 282; South Ottawa *v.* Perkins, 94 U. S. 260; Post *v.* Kendall Co., 105 U. S. 667; Bates Co. *v.* Winter, 97 U. S. 83; Daviess Co. *v.* Dickenson, 117 U. S. 657; Carroll Co. *v.* Smith, 111 U. S. 556; Dixon Co. *v.* Field, 111 U. S. 83; Burrill *v.* Boston, 2 Cliff. (U. S.) 590; Siebreicht *v.* New Orleans, 12 La. Ann. 496; Fox *v.* New Orleans, 12 La. Ann. 154; Mayor, etc., of Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535; Baltimore *v.* Eschbach, 18 Md. 276; Horn *v.* Baltimore, 30 Md. 218; Baltimore *v.* Musgrave, 48 Md. 272; Maupin *v.* Franklin Co., 67 Mo. 327; Perkin-

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son *v.* St. Louis, 4 Mo. App. 322; Cheeney *v.* Brookfield, 60 Mo. 53; McCaslin *v.* State, 99 Ind. 428; Commrs. of Tippecanoe Co. *v.* Cox, 6 Ind. 403; Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Inhabitants of Township No. 11 *v.* Weir, 9 Ind. 224; State *v.* Bevers, 86 N. Car. 588; Spalding *v.* Lowell, 23 Pick. (Mass.) 71; Vincent *v.* Nantucket, 12 Cush. (Mass.) 103; Parsons *v.* Inhabitants of Goshen, 11 Pick. (Mass.) 396; Anthony *v.* Adams, 1 Metc. (Mass.) 284; Hood *v.* Mayor, etc., of Lynn, 1 Allen (Mass.) 103; Dill *v.* Wareham, 7 Metc. (Mass.) 438; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 845; Agawam Bank *v.* South Hadley, 128 Mass. 503; Yancey *v.* Hopkins, 1 Munf. (Va.) 419; Nalle *v.* Fenwick, 4 Rand. (Va.) 585; Bridgeport *v.* Housatonic R. Co., 15 Conn. 475; Perry *v.* Superior City, 26 Wis. 64; State *v.* Hastings, 12 Wis. 596; Shipman *v.* State, 43 Wis. 381; Nash *v.* St. Paul, 8 Minn. 172; Newbery *v.* Fox, 37 Minn. 141, 5 Am. St. Rep. 830; Donovan *v.* Mayor, etc., of N. Y., 33 N. Y. 291; Cornell *v.* Guilford, 1 Den. (N. Y.) 510; Hodges *v.* Buffalo, 2 Den. (N. Y.) 110; Brady *v.* Mayor, etc., of N. Y., 20 N. Y. 312; Martin *v.* Mayor, etc., of Brooklyn, 1 Hill (N. Y.) 545; Cuyler *v.* Trustees of Rochester, 12 Wend. (N. Y.) 165; Appleby *v.* Mayor, etc., 15 How. (N. Y.) Pr. 428; Boyland *v.* Mayor, etc., of N. Y., 1 Sandf. (N. Y.) 27; Albany *v.* Cunliff, 2 N. Y. 165; Halstead *v.* Mayor, etc., of N. Y., 3 N. Y. 430; Boom *v.* Utica, 2 Barb. (N. Y.) 101; McDonald *v.* Mayor, etc., of N. Y., 63 N. Y. 23, 23 Am. Rep. 144; Overseers of Norwich *v.* Overseers of New Berlin, 18 Johns. (N. Y.) 382; Crouch *v.* Hayes, 27 Hun (N. Y.) 222; Davies *v.* New York, 48 N. Y. Supr. Ct. 194; People *v.* Supervisors of N. Y., 1 Hill (N. Y.) 362; Peterson *v.* Mayor, etc., of N. Y., 17 N. Y. 449; Cowen *v.* West Troy, 43 Barb. (N. Y.) 48; Smith *v.* Buffalo, 1 Buff. Super. Ct. 493; Cleveland *v.* State Bank of Ohio, 16 Ohio St. 236, 88 Am. Dec. 445; Trustees of Paris Township *v.* Cherry, 8 Ohio St. 564; Western College of Medicine *v.* Cleveland, 12 Ohio St. 375; Leavenworth *v.* Rankin, 2 Kan. 358; Ottoman Cahvey Co. *v.* Philadelphia (Pa.), 13 Am. & Eng. Corp. Cas. 524; Hague *v.* Philadelphia, 48 Pa. St. 527; Philadelphia *v.* Flanigan, 47 Pa. St. 21; Livingston *v.* Pippin, 31 Ala. 542; City Council of Montgomery *v.* Montgomery, etc., Plank Road Co., 21 Ala. 76; Wetumpka *v.* Winter, 29 Ala. 651; Mitchell *v.* Rockland, 43 Me. 495; Mitchell *v.* Rockland, 41 Me. 363, 66 Am. Dec. 252; Fluty *v.* School District, 49 Ark. 94; Halbut *v.* Forrest City, 34 Ark. 346; Taft *v.* Pittsford, 28 Vt. 286; People *v.* Baraga Township, 39 Mich. 554; Neely *v.* Yorkville, 10 S. Car. 141; Haynes *v.* Covington, 13 Smed. & M. (Miss.) 408; Treadway *v.* Schnauber, 1 Dak. 236; Bryan *v.* Page, 51 Tex. 532, 32 Am. Rep. 637; Nashville *v.* Hagan, 9 Baxt. (Tenn.) 495; Ohio L. Ins. & T. Co. *v.* Merchants' Ins. & T. Co., 11 Humph. (Tenn.) 1; Trustees of Belleview *v.* Hohn,

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82 Ky. 1, 4 Am. & Eng. Corp. Cas. 524; Murphy *v.* Louisville, 9 Bush (Ky.) 181; Craycraft *v.* Selvage, 10 Bush (Ky.) 708; Prince *v.* Quincy, 105 Ill. 138, 2 Am. & Eng. Corp. Cas. 66, 44 Am. Rep. 785; Alton *v.* Mulledy, 21 Ill. 76; Chicago *v.* Shober, etc., Co., 6 Bradw. (Ill.) 560; Atlantic City Water Works Co. *v.* Read, 50 N. J. L. 665, 24 Am. & Eng. Corp. Cas. 562. *Compare* Allegheny City *v.* McClurkin, 14 Pa. St. 81; East St. Louis *v.* East St. Louis Gas Co., 98 Ill. 430, 38 Am. Rep. 97; State *v.* Buffalo, 2 Hill (N. Y.) 434; State Board of Agriculture *v.* Citizens' St. R. Co., 47 Ind. 407; Maher *v.* Chicago, 38 Ill. 266.

And a party making a contract with a municipal corporation which is *ultra vires* is not estopped, when the corporation brings an action founded thereon, to set up its want of authority to make it. Montgomery *v.* Montgomery, etc., Plank Road Co., 31 Ala. 76.

But where a municipality receives money in advance on a contract which it had no authority to make, and afterwards refuses to fulfill the contract, it appears that the other party may recover back the money, in an action for money had and received. Dill *v.* Wareham, 7 Metc. (Mass.) 438.

Where the consideration received by a corporation under an *ultra vires* contract can be restored, equity will not relieve the corporation from the performance of the contract without a restoration by it of the consideration. Turner *v.* Cruzen, 70 Iowa 202, 15 Am. & Eng. Corp. Cas. 340; Pratt *v.* Short, 53 How. (N. Y.) Pr. 506; Leonard *v.* Canton, 35 Miss. 189; Argenti *v.* San Francisco, 16 Cal. 282; Moore *v.* Mayor, etc., of N. Y., 73 N. Y. 238; Lucas Co. *v.* Hunt, 5 Ohio St. 488, 67 Am. Dec. 303. And see Brown *v.* Atchison, 39 Kan. 37, 22 Am. & Eng. Corp. Cas. 210.

And where a municipal corporation dealing with individuals assumes powers upon which the validity of its acts depends, and it turns out that it does not possess the specific power relied on, it is not thereby excused from performance of its obligations, if they can be performed through the agency of other powers which it does possess. Maher *v.* Chicago, 38 Ill. 267.

CITY OF AUBURN

v.

MAYER.

(*Supreme Court of Nebraska, Feb. 23, 1899.*)

Suspension of Liquor License—Repayment of Fee.*—Where a liquor license was issued, an appeal then taken, and the license suspended, the appeal finally determined in favor of the applicant, and the license reissued, *held*, following the principle of former cases, that the licensee was entitled to repayment of such proportion of the license fee as the time when his enjoyment of the license was suspended bore to the license year.

(Syllabus by the Court.)

ERROR by defendant to Nemaha county district court. *Affirmed.*

B. Frank Neal and *A. J. Burnham*, for plaintiff in error.

G. W. Cornell and *W. H. Kelligar*, for defendant in error.

IRVINE, C. This action was begun by Mayer against the city of Auburn, in the county court, to recover certain unearned license money and money paid for an occupation tax. Mayer had judgment, and the city took the case on error to the district court, where the judgment was affirmed. The city now brings the case here. The facts are undisputed. Mayer applied for a license to sell intoxicating liquors. The license was granted, but subsequently an appeal was taken to the district court by remonstrators, and in consequence of *mandamus* proceedings for that purpose the council was compelled to revoke the license. The application afterwards coming on to be heard in the district court, there was a decision in favor of the applicant, and a new license was accordingly issued. The license money here in controversy is

*See notes at end of case.

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the proportionate part of the annual charge for the period when the operation of the license was suspended by the appeal.

It has been too long and too well settled by decisions of this court to permit of any change, except through legislation, that the license fee is not paid for the privilege of asking for a license, but for the license itself, and that, where the license fails through no fault of the applicant, he is entitled to have refunded the unearned portion. State *v.* Cornwell, 12 Neb. 470, 11 N. W. 729; Lydick *v.* Korner, 15 Neb. 500, 20 N. W. 26; State *v.* Weber, 20 Neb. 467, 30 N. W. 531; Chamberlain *v.* City of Tecumseh, 43 Neb. 221, 61 N. W. 632; School Dist. *v.* Thompson, 51 Neb. 857, 71 N. W. 728. This rule has been applied where a license improperly issued has been ultimately revoked. Indeed, it is sought to distinguish the present case from those cited on the ground that the rule has been laid down with reference to invalid licenses alone. No such distinction can be drawn from the cases, and it at once strikes the mind as incongruous and unjust that one who has, without right, enjoyed for a certain time a license, should be permitted to recover the fee for the remainder of the period, while one possessing a license ultimately determined to have been rightfully issued may not recover back for a portion of the time when he has unjustly been prevented from enjoying the license. As to the occupation tax, it is conceded that the ordinance imposing it is of such a character as to make applicable whatever may be determined as to the license. Affirmed.

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License Tax—Voluntary Payment—Action to Recover Back.—Where a person before engaging in the business of selling liquors has voluntarily paid the liquor tax, upon the subsequent abandonment of the business because he is unwilling or unable to furnish the bond required, he cannot maintain an action against the municipality to recover the amount of the tax so paid. Curry *v.* Township of Tawas, Mich. Sup. Ct., June 6, 1890. CAHILL, J., said: "This suit was brought

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something over five years after the money was paid. The circuit judge, who tried the case without a jury, held that the plaintiff could not recover, and we think rightly so. The plaintiff voluntarily paid this money as a tax she was legally bound to pay before engaging in the business of selling liquor. After paying it she commenced business, and only abandoned it because she was unwilling or unable to comply with the requirement to file the bond that was satisfactory to the proper authorities. There is no statute authorizing the repayment of money under such circumstances, and, without such a statute, it would be a gross breach of duty for the township board to assume to pay money out of the township treasury for any such purpose. Money once voluntarily paid and lodged in a public treasury can only be paid out by warrant of law. If there be no law, there can be no payment. Any attempted payment, such as this would have been if made, would have been a misappropriation of public money, for which all persons concerned would have been personally liable to the municipality whose funds were used." And in Peyton *v.* Hot Spring Co. (Ark.), 29 Am. & Eng. Corp. Cas. 562, it was held where, immediately after payment of a license tax, an order has been made by the county court prohibiting the sale of liquor within the district under the provisions of Mansf. Ark. Dig., § 4524, which provides that the sale of any liquor within three miles of a church may be prohibited by order of the county court on the application of a majority of the inhabitants, the person who has paid the license tax is not entitled to recover it.

In Town of Ligonier *v.* Ackerman, 46 Ind. 552, a town had in good faith adopted an ordinance requiring a license to be obtained for the retail of intoxicating liquors, in pursuance of an amendatory act of the legislature, and it was held that a person who had applied for a license and received and paid for the same without objection could not recover back the money thus paid, although the act of the legislature and the ordinances of the town thereunder were invalid.

It is essential in making a demand under such circumstances, that the money should not have been voluntarily paid. Town of Sullivan *v.* McCammon, 51 Ind. 264; Town of Edinburg *v.* Hackney, 54 Ind. 83. See, also, Jackson *v.* Newman, 59 Miss. 385, 42 Am. Rep. 367; Catoiz *v.* Watterson (Ohio), 14 Rep. 532; Savannah *v.* Feeley, 66 Ga. 32; Winter *v.* Montgomery, 65 Alabama, 403.

Refunding Moneys Collected.—Where a license is cancelled the court should direct repayment *pro tanto* of the amount paid for the same for the unexpired term. Lydick *v.* Korner, 15 Neb. 500.

Where a party receives a license to keep a dram shop, and pays it, the city cannot, by repudiating the act of the officer who issued the

license, maintain an action against the said party without returning the money paid for the license. Martel *v.* East St. Louis, 94 Ill. 67.

Where, on taking out a license for the sale of liquor, the dealer paid therefor, which he was not bound to do until the expiration of the time for taking an appeal, and upon appeal the license was refused, *held*, that the county was not bound to refund any part of the money. Monroe County Commrs. *v.* Kreuger, 88 Ind. 231.

Where a remonstrance against a liquor license was overruled by the city council, the amount paid, and license issued, no appeal having been taken in a reasonable time, and subsequently the license was cancelled by the district court; *held*, that the treasurer was not liable to refund the money. Lydick *v.* Korner, 15 Neb. 500.

REYNOLDS *et al.*

v.

CITY OF WATERVILLE *et al.*

(*Supreme Judicial Court of Maine, Dec. 26, 1898.*)

Limitation of Indebtedness—Constitutionality of Statute.—By article 22 of the amendments to the constitution of Maine it is provided as follows: "No city or town shall hereafter create any debt or liability, which singly, or in the aggregate with previous debts or liabilities, shall exceed five per centum of the last regular valuation of said city or town; provided, however, that the adoption of this article shall not be construed as applying to any fund received in trust by said city or town, nor to any loan for the purpose of renewing existing loans or for war, or to temporary loans to be paid out of money raised by taxation, during the year in which they are made."

The court construes the act of the legislature (chapter 523, Laws 1897) incorporating the city hall commission of Waterville as imposing additional indebtedness and liability on the city while its municipal debt is already beyond the constitutional limit, the commission being regarded as merely the agent or trustee of the city; and therefore declares such act unconstitutional and void.

Same—Taxpayers' Remedy.*—A proper remedy of taxpayers to prevent proceedings by the city in pursuance of the act is an equity by injunction.

Same—Valuation of Property.*—The city's own valuation, and not

*See notes at end of case.

that made by the state board of commissioners, is the test by which to ascertain the amount of indebtedness which settles the constitutional limit.

Time Contracts.—The court expresses a willingness, in a proper case, to adopt the rule adopted by many authorities, which allows a municipal corporation, although its indebtedness has reached the constitutional limit, to make time contracts, in order to provide for certain municipal wants which involve only the ordinary current expenses of municipal administration, provided there is to be no payment or liability until the services be furnished, and then to be met by annual appropriations and levy of taxes, so that each year's services shall be paid for by each year's taxes.

SAVAGE, J., dissenting.

(Official.)

Argued before PETERS, C. J., and EMERY, HASKELL, WISWELL, STROUT, and SAVAGE, JJ.

E. F. Webb and *J. W. Symonds*, for plaintiffs.

H. M. Heath, *C. L. Andrews*, *Harvey D. Eaton*, City Sol., and *W. C. Philbrook*, for defendants.

PETERS, C. J. The constitution of this state provides that no city or town shall create any debt or liability which singly, or in the aggregate with previous debts or liabilities, shall exceed 5 per centum of the last regular valuation of said city or town.

In interpreting this constitutional provision, we believe we would be willing to adopt the middle doctrine, on which some of the authorities stand, called by counsel for respondents "the rule of reconciliation," which allows a municipal corporation, although its indebtedness has already reached the constitutional limit, to make time contracts, in order to provide for certain municipal wants which involve only the ordinary current expenses of municipal administration, provided there is to be no payment or liability until the services be furnished, and then to be met by annual appropriations and levy of taxes, so that each year's services shall be paid for by each year's taxes; the scheme being variously denominated in the cases as a business, or cash, or pay as you go transaction, and the like.

Time Contracts.

And we incline to the belief that, on this principle, a town or city may contract for the use of a hall for a term of years, to be used for strictly municipal purposes, provided the principle be fairly applied in any case, and not be abused; not, however, allowing a hall to be hired for the purpose of subletting either the whole or any part of it. Municipal necessities are only to be regarded.

But, under the guise of the principle above stated, a municipality should not be allowed to pass off, as an agreement for renting a hall, an agreement which is not really entered into strictly for such purpose. And we feel that the transaction here in question must be repudiated upon that ground. The transaction has in some respects the semblance of a lease, but it is a misnomer to call it such. It is attempted to make it one thing in form, while in reality it is something else. It is apparent enough that the city is to have, not merely the use of the building to be erected, but the building itself. It is not to get an annual service, to be paid for out of annual revenues, but the city is to acquire a city hall presently, to be paid for by assessments of taxes for the long period of 30 years. It is a purchase.

It would not be a misinterpretation to say that the city of Waterville, instead of leasing the property, undertakes to purchase or pay for it on the installment plan, and that what are called rentals for the hall are merely partial payments on its cost.

In Gross *v.* Jordan, 83 Me. 380, 22 Atl. 250, the headnote is as follows: "Writing an agreement in the form of a lease does not alter the character of an instrument which, by its more essential terms, discloses itself to be a conditional sale of personal property." The facts of that case showed that by a paper called a "lease", and sprinkled with phrases appropriate to a lease, one person received a wagon of another, agreeing to pay $15 a month for its use; and when the sums so paid amounted to $165 and interest thereon, such party was to receive title to the wagon. The court said: "This paper, which calls itself a lease, is a conditional sale of property,

the title passing when the full price shall have been paid. Its own terms are the true test of the nature of a contract, whatever its framers may denominate it." That case was followed by other cases in this state where agreements to convey pianos and sewing machines were attempted to be passed off and construed as leases, but the attempts did not prevail.

We need not dwell on this point, however, because our opinion is that the true nature of the transaction is rather the hiring of money by the city upon the security of city property, through the intervention of a trustee, the title to the property being and remaining in the city from the beginning to the end, subject only to the lien upon it in favor of bondholders for money to be lent. This kind of agreement is so clearly and satisfactorily explained by POMEROY in his Equity Jurisprudence, in section 995, that we here quote the entire section, as follows: "Deeds of Trust to Secure Debts. A special form of trust for the benefit of creditors, peculiar to the law of this country, has become quite common in several of the states, and requires a brief description. A 'deed of trust to secure a debt' is a conveyance made to a trustee as security for a debt owing to the beneficiary, a creditor of the grantor, and conditioned to be void on payment of the debt by a certain time, but, if not paid, the trustee to sell the land, and apply the proceeds in extinguishing the debt, paying over any surplus to the grantor. The object of such deeds is, by means of the introduction of trustees, as impartial agents of the creditor and debtor, to provide a convenient, cheap, and speedy mode of satisfying debts on default of payment. A distinction, however, should be noted in this connection between unconditional deeds of trust to raise funds for the payment of debts and deeds of trust in the nature of mortgages, the former being absolute and indefeasible conveyances for the purposes of the trust, while the latter are conveyances by way of security, subject to a condition of defeasance. In many states deeds of trust to secure debts are much favored, either on account of the intervention of disinterested third par-

ties, whose position as trustees secures to the debtor fair dealing, or the absence of any necessity for the intervention of the courts, though in some states they are required to be judicially foreclosed, and are, therefore, of no practical advantage. Indeed, in a majority of the states this form of security has come into general, and, in some instances, universal, use. An intimate relation exists between deeds of trust to secure debts, and mortgages,especially mortgages containing powers of sale. In fact, the former are generally considered as being, in legal effect, mortgages. Where a mortgage is regarded as a conveyance of the legal estate, a deed of trust can be no less a conveyance of the legal estate; and, where a mortgage is considered as but a mere lien, a deed of trust is generally considered as nothing more than a lien. A conveyance, as a general rule, is not necessary on payment of the debt secured by a deed of trust, satisfaction being entered in the margin, as in the case of a mortgage. Statutes relating to the recording of mortgages embrace deeds of trust, without special mention of the latter, as also do those relating to powers of sale contained in mortgages. While a mortgage with power of sale may be assigned, in the absence of words restricting an assignment, and the power of sale passes thereby to the assignee, a deed of trust to secure a debt, being a confidence reposed, cannot be delegated, and no assignment is possible, without an express and positive permission in the deed. The duties of the trustee of a deed of trust require the utmost good faith and impartiality as regards both the debtor and creditor. He is personally liable in a suit at law for damages to the party aggrieved for a failure to use reasonable diligence, or an abuse of his discretionary powers; and a sale may be enjoined or set aside at the instance of the injured party. It is not necessary that the person who is to execute the power in a trust deed should join in the deed, or execute any formal writing showing his acceptance of the trust; nor is it necessary that the beneficiary should signify his assent by any formal writing, for his assent is presumed, since the deed is for his benefit. Where a trustee has accept-

ed the trust, he cannot renounce it without the consent of the beneficiary, or of a court of equity; and he may be compelled to discharge the trust."

The statutory commission in the case before us was very little more than a passive trustee, and would be entirely such when the bonds should become paid. The trust at all times was to be fastened upon the estate, rather than upon the trustee; and a conveyance of the estate by the city itself, after payment of the debt, could not be repudiated by the trustee. Sawyer *v.* Skowhegan, 57 Me. 500; Pom. Eq. Jur. § 988. So there was no need of inserting in the act that the commission should reconvey to the city. The learned counsel for the respondents admits that an equity of redemption reposed in the city. When, therefore, the debt should become paid, the new city hall would be absolutely the property of the city.

There appears upon the brief of respondents this assertion: "In many cases where commissioners, not being incorporated, have issued bonds, the courts have held that the city was liable, as the statutes, properly construed, required a holding that such unincorporated commissioners were simply agents of the city." We can see no reason why an incorporated commission may not act as an agent or trustee just as well. An examination of the various sections of the legislative act reveals the fact that the commission was to be but the humble trustee of the city of Waterville, and the city itself the real owner of the property.

The commission, as created by the act (Laws 1897, c. 523), was naked of all authority excepting in just one respect, and that was as a formal medium through which the city could secure to the bondholders its debt. It will be seen all the way along that the commission is to be under the control of the city. The commission could sue and be sued, but it had no property, and was subjected to no risks. It is entitled to have certain officers, and such others "as the city may direct." The city treasurer is to be the treasurer of the com-

Limitation of Indebtedness—Constitutionality of Statute.

mission, but no new bond is required of him, and his sureties would not be responsible for his defaults, unless he be considered as acting for the city in what he does for the commission.

Section 2 declares that the powers and duties of the commission shall be controlled by the city. The commission is to have "such powers as are already conferred on it by the city," and it "shall have any other powers and perform any other duties which may hereafter from time to time be voted and conferred upon it by the city council." This does not sound much like the city being only a hirer and tenant of the property.

Section 3 imposes merely a clerical duty upon the commission, without the exercise of any discretionary power whatever. It is authorized to issue its bonds "at such rates and on such times and for such amounts as the city council may approve," not exceeding $75,000. By section 4 the city is authorized, "when its council so votes," to convey its city hall lot, and all improvements thereon,—presumably of great comparative value,—to the commission, for the sole purpose of securing the bonds before named, and for no other purpose; the commission to hold the property and the new building to be erected thereon in trust as security therefor. These are all very commendable provisions, but only go to show the true relations which the city was to hold towards this city property, and indicating that the city was really to build the new hall as its own property. And does not the very mischief here arise which the constitutional amendment was designed to prevent, the city thus getting their hall in the present, and having 30 years of continuous annual taxations with which to pay for it? And it is further deducible from these and other clauses in the legislative act that the commission is virtually created and controlled by the city for its own purposes. It is a corporation formed in blank, the city filling the blanks.

Section 5, in case of a default in the payment of bonds or coupons, authorizes bond holders to petition the court to

enforce their lien by appointing a receiver for the sale and distribution of the property. The petition goes to the court, ignoring the commission. Is there any doubt, should there be an excess of assets over indebtedness, that the balance would belong to the city as the debtor and owner?

By section 6 the city is "authorized and required to raise annually by taxation such sum as may be necessary to pay all expenses for repairs, insurance and management of said city building, when completed, together with an annual rental of said building in a sum equal to the annual interest on the bonds issued and outstanding, * * * and it shall be authorized to except said property from taxation while held in trust." These are exactly the burdens which the city would necessarily bear as an owner of the property, and it is nothing less than affectation to style such payments rentals instead of payments of interest on the bonds. It is, indeed, an ingenious provision to fix the so-called rental as just equivalent to interest on the bonds and the expenses, because it has a look of fairness on its face. But the unfairness of this proposition is exposed when we find in section 7 a compensatory clause "authorizing and empowering the city to raise by taxation or other means such other sums as may be voted by the city council to add to the sinking fund to be provided for the purchase of the bonds and coupons issued under section 3 of this act." It certainly cannot be pretended that these occasional taxations made from time to time are rentals, or in the nature of rentals, for it is expressly provided that they shall swell the sinking fund for the payment of the bonds for the benefit of the city, and of course to lessen the equitable, if not legal, indebtedness of the city. The language is "to raise money by taxation or other means." What other means, unless it be by borrowing money? It is just here that the mischief may be apprehended which the constitution intends to prevent. The city could raise any amount of money at any time, under this general authority, without restriction as to amounts, and without regard to conditions and circumstances.

Absolute power is committed to the city by the legislature. It was just this kind of domination practiced by majorities, and this improvidence of legislatures, that the constitutional amendment was designed to restrain. If the act in question is to be deemed constitutional, in spite of the real plan, transparent in it, why may not the city of Waterville be able, under a similar scheme of so-called rentals, to obtain for itself, by legislative permission, any other expensive scheme of improvements it might see fit to undertake?

Section 7 contains grotesque provisions: "In consideration of the rental as aforesaid the city of Waterville shall become the tenant of said city building when completed." If that shall be taken to mean that the city may remain in possession of its property without interference of bondholders, so long as it promptly pays the interest on the bonded indebtedness, and keeps the property in good preservation and repair, that idea may be easily understood. If it means, however, that the city is to be a tenant, and some other party a landlord, who is such landlord? It cannot be the constructors, for they are to have their pay. Nor can it be the bondholders, for they have a lien only, and must go to the court for the enforcement of any of their rights. It cannot be the commission, for there are no words in the act investing them with any such authority. The landlord, then, cannot be other than the city itself; the city to be both landlord and tenant. The draftsman of the legislative act seems to have been in some confusion of mind on this point, evidently regarding the city as one party and its city council as another, especially when he declares, in section 7, that the city shall become tenant "under such provisions and directions as the city council may vote from time to time." But it is, of course, difficult to keep up the landlord and tenant theory and maintain consistency at the same time. Another inconsistent thing on that theory is that the city is to pay a full rent for the property as tenant, and at the same time receive only partial benefit from it, turning all

the earnings to be received from subletting the hall into a sinking fund for paying the bonds issued by the commission.

Section 10, in effect, affirms again that the commission shall have no power excepting to act as a medium through which the city may deal with the bondholders.

Certain provisions contained in section 11 are very important as disclosing the true nature of these transactions on the part of the city of Waterville, which section is as follows: "All duties and powers necessary to be exercised with respect to the erection of said city building and the care of the same after erection, not conferred on said city hall commission by any existing ordinance or vote of the said city of Waterville, or by the provisions of this act, shall be vested in the city council of Waterville. The city of Waterville, and not said city hall commission, shall be liable for all damages which said city would have been liable for in the erection of said building or the proper care of the same, had not the trust herein provided for been created."

By this section all duties and powers to be exercised in the construction and after-management of the hall, not already lodged in the commission by the city council or by the act,—and we do not find that any are so lodged,—are vested in the city itself. How inconsistent with the contention that the city is to be really a tenant paying rent! It may be admitted that it is provided it may be called a tenant. And so purely submissive an agent of the city is the commission to be, and so thoroughly and abjectly under its control, that it is to be protected, during the construction of the hall, from all incidental risks, and the city is to assume all the same. What an unheard of proposition that a tenant is to pay a full price for his tenancy, and also be answerable for all injuries and misfortunes that may happen while the building he is to occupy is in process of construction!

But none of the features of this section are at all inconsistent with the true nature of the transaction as the complainants claim it to be. They contend that the city is the

actual party constructing the city hall, that it is to construct it itself with money to be hired upon the security of its city hall lot and all improvements and erections thereon, no other person or party contributing either money or liability thereto; that the form of the security is to be by a trust deed to a trustee upon a term of credit of 30 years; and that the means of repaying the money borrowed is by annual installments for the same period from money collected by annual taxes assessed for the purpose, and occasional taxes in the meantime, and by earnings of the hall when used for other than municipal purposes; the city in the beginning having the title to the estate subject to the bonded indebtedness, and in the end free of all indebtedness or claim. This construction renders every section and clause of the act sensible, consistent, and clear, while any other construction renders it illogical and inconsistent throughout.

It appears from the facts that at first the city made its contract directly with the builders, and, finding it illegal, afterwards annulled that contract, intending to make the same contract over again indirectly through its incorporated agent or trustee. Here were two forms, but the embodiment in each case is the same. Where is there any essential difference between the two?

Section 12 provides that all vacancies in the membership of the commission shall be filled by the city council. It constitutes its own agent or trustee at its liking.

Section 13 provides for the city's acceptance of the act, and it accepted it. By its acceptance the city assents to all the taxations provided for, and to all the obligations imposed upon it by the act. The learned counsel for respondents sets up the contention that the true test of its liability is whether the city can or cannot be sued, arguing that the only remedy against it must be by *mandamus*. But is not *mandamus* a legal remedy of the most potential kind? And is there not a clear liability where *mandamus* can be maintained? After the city accepted the act, were the act free from the taint of unconstitutionality, would not the city be under a

requirement for 30 years to make at least an annual assessment of taxes whereby to make annual payments on its indebtedness? It is the only mode of enforcing collections from municipalities in the practice of many of the states. Does not such a requirement constitute a liability? And could not equitable, if not legal, proceedings be maintained against the city in some conditions that might arise? Can there be any doubt that the bondholders could, by equity process, enforce the obligation expressly assumed by the city to insure the building and keep it in repair? And why may they not also enforce the city's obligation to pay interest on the bonds, either directly or by process in the name of its trustee? Or are all of these provisions merely a rope of sand?

It must be confessed that the act in question is a very dexterous attempt to accomplish one thing under the name of another thing,—as plausible as it is fallacious. It is error with truth's clothes on. And such erroneous propositions are not always easy to answer. Dr. Whately truly said of erroneous arguments: "Although they are most unsubstantial, it is not easy to destroy them. There is not a more difficult feat known than to cut through a cushion with a sword." It is sure, however, if the plan here, intended, as it is, to avoid, rather than uphold, the law, shall prevail, the result as a precedent will shatter the constitutional amendment into pieces.

The respondents further contend that the remedy here is at law, and not in equity. Such a decision would be a victory for respondents, because the city could control its common-law obligations to suit the majority, while the constitutional amendment is for the protection of the minority against the majority. Same—Taxpayers' Remedy.

We have no doubt that the city's own valuation, and not the valuation made by the state board of commissioners, is the test by which to ascertain the amount of indebtedness which settles the constitutional limit. If the city wants its valuation increased for one purpose let it increase it, by its own act, for all purposes. Same—Valuation of Property.

Our conclusion is that the bill must be sustained, and that the deed to the city hall commission from the city of Waterville must be adjudged to be illegal, null and void, and that the contract between the commission and the firm of M. C. Foster & Son for erection of a city hall must also be adjudged to be illegal, null and void, and that an injunction must issue against all the respondents to prevent any enforcement of such contract.

Decree accordingly, and for costs against the city of Waterville.

SAVAGE, J. (dissenting). I am unable to concur in the opinion of the court. And the importance of the decision, as affecting municipal development in this state, both now and hereafter, seems to justify me in placing on record the reasons which govern my dissent.

The situation may be fairly summarized as follows: The inhabitants of the city of Waterville desired the present use of a city hall building, which, by reason of the constitutional debt limit, they were unable to build by borrowing money therefor. The city, being indebted already beyond its debt limit, could not incur any debt for that purpose. It owned land which had already been devoted to and used for city hall purposes. It was willing that the land and the new building which might be built upon it should be held for the payment of the cost of building. In consideration of the use of the building, the city was willing to be bound to pay the actual current expenses, and a sum equivalent to the interest on the cost of the building, and to assume liability for such damages as might be incurred in the construction of the building. The city also desired to have the right to pay, at its option, whenever it could constitutionally do so, the cost of the building, at one time or in installments. None of these things, however, could be done if thereby the city was to incur a debt or liability, within the meaning of the constitution. The legislature sought to enable the inhabitants of the city of Waterville to accomplish these purposes by the act creating the city hall commission.

I concede all that is said in the opinion of the court concerning the cordial, even intimate, relations between the commission and the city. I see no reason why they should not be so.

The *personnel* of the commission, the manner in which its members should be chosen, and its duties and powers concerned only two classes,—the inhabitants of the city and the prospective bondholders. It mattered not how closely the city was enabled to control the doings of the commission, or the management of the building, if those proposing to buy bonds were satisfied. That was merely a matter of regulative machinery. Nor did it matter, I think, if, as stated in the opinion, the city would have the title to the building, subject to the lien of the bondholders. That lien is their substantial protection; and, if they were satisfied, no one else should complain. Nor is it of any particular consequence whether the city, in its occupancy of the building, is correctly styled a tenant, or whether the compensation it is to pay for the use of the building is properly a rental. These are merely names.

There seems to me to be no good reason why the city, with legislative permission, under these circumstances, may not devest itself of the right to the use of the building unless it pays what is equivalent to a fair rental. It seeks to put the property in trust for the benefit of those persons who advance money for the purpose of building it, and for the purposes of the trust it is to pay a compensation, which, in the legislative act, is styled "rent." It is to remain in possession and control, to be sure, but this privilege is subject to the duty of paying the compensation. If an individual places his property in trust, is it not permissible for him to agree to pay a rent in consideration of retaining the use?

All these things do, indeed, show the relations which the city bears to the building and to the commission. Aside from the constitutional limit upon municipal indebtedness, I am unable to see why such relations may not properly be created by the legislature. And it is the legislature which has

attempted to create them in this case. It must be remembered that we are not dealing with natural persons. These relations are not to be deemed colorable, as is frequently the case in the relations between private individuals, and as was the case in Gross *v.* Jordan, 83 Me. 380, 22 Atl. 250, cited in the opinion. The relations in this case were created by law, —by the statute,—by the only body which had the right to create them. Both the city and the commission are creatures of the legislature. Their powers, duties, and responsibilities are all limited by the legislature, and subject to legislative change and regulation. The same power which created the city of Waterville also created the commission, and granted to it certain powers, and imposed certain duties. Waterworks *v.* Woodward, 49 Iowa, 58.

These relations are lawful, unless by operation of this statute the municipal debt of Waterville would be increased. The statute creating this commission should be construed, like every other statute, according to the clear intention of the legislature as expressed therein. That intention, I take it, was that the city might put its city hall lot into a trust; that the trustee might hire money for the construction of a city hall on the security of the property alone; that the city should not, in any event, be liable for the debt; that the city might have the possession and control of the building by paying annually therefor a fair compensation, but not otherwise; and the city might pay from time to time, or at one time, if it could constitutionally, the amount necessary to redeem the property from the bondholders. This is all there is to it.

The real question, however, underlying all others, is whether this legislation is in contravention of the constitution of Maine, in that it may increase the debt of the city beyond its limits.

Whatever may be the opinion of the court of the wisdom or expediency of this instrumentality devised as a part of municipal government in the city of Waterville, if its operation does not tend, directly or indirectly, "to increase the

debt or liability" of the city of Waterville, it should not be held to violate the constitutional provision referred to. To the legislature, and not to the court, has been assigned the power to create municipal corporations and municipal governments, and the duty to modify, regulate, and control them for the best interests of the people. With the exercise of this duty we should not interfere, unless the legislature oversteps the organic law of the state. The city is the creature of the state. Its powers and duties are defined and limited by the state, acting through the legislature. The state can abolish it, and substitute another instrumentality in its place. The state may create, within the town or city, other municipal instrumentalities in furtherance of the public weal,— as, for instance, village corporations, fire and sewerage districts,— all performing municipal duties which otherwise would devolve, or might have been devolved, upon the town or city itself. The state in some instances has created commissions to aid in municipal regulation, like police commissions and fire commissions, answerable, not to the municipality, but to the statutes which created them.

I think it is not to be questioned that such legislation is within the power of the legislature. Inhabitants of North Yarmouth *v.* Skillings, 45 Me. 133; People *v.* Draper, 15 N. Y. 532.

The complainants charge, and in argument claim, that the act incorporating the city hall commssion, as a whole, is "an evasion and legal artifice" to enable the city to increase its debts and liabilities far beyond the constitutional debt limit created by the twenty-second amendment to the constitution, and is, therefore, unconstitutional and void.

The broad ground is taken that the statute under consideration is nothing but a mask, a scheme, a contrivance, a legal artifice, by which Waterville can get a city building, while indebted beyond the constitutional limit, by indirectly creating a debt or liability, and thus break the spirit, if not the letter, of the amendment above referred to.

"To get at the thought or meaning expressed in a consti-

tution, the first resort, in all cases, is to the natural signification of the words in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning apparent on the face of the instrument must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. * * * The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." Lake Co. *v.* Rollins, 130 U. S. 662, 9 Sup. Ct. 651.

It is a striking and suggestive fact that the states whose courts have construed the debt-limit amendments most narrowly and strictly most abound in various schemes and artifices for municipal improvements, like incorporated "road districts," "sanitary districts," "drainage districts," "fire districts," and "commissions" of all sorts possessing power to levy taxes or issue bonds. Not only is it held that these schemes and artifices are constitutional, and that the legislature can create every conceivable description of corporate authorities, and endow them with all necessary powers, but it is also held that the power of the original municipality to incur indebtedness is not in the least affected by the indebtedness or authorized indebtedness of its submunicipalities. The two corporations are in this respect entirely distinct. Wilson *v.* Board, 133 Ill. 443, 27 N. E. 203; West Chicago Park Com'rs *v.* City of Chicago, 152 Ill. 392, 38 N. E. 697; People *v.* Salomon, 54 Ill. 37; Butz *v.* Kerr, 123 Ill. 659, 14 N. E. 671; Owners of Lands *v.* People, 113 Ill. 304; City of St. Louis *v.* Shields, 62 Mo. 247; Horton *v.* Commissioners, 43 Ala. 598; Kelly *v.* City of Minneapolis (Minn.) 65 N. W. 115; Orvis *v.* Board, 88 Iowa, 674, 56 N. W. 294; Todd *v.* Laurens (S. C.) 26 S. E. 682; Adams *v.* Institution, 136 N. Y. 52, 32 N. 622.

The act in question creates a city hall commission, to which the city of Waterville has the power of appointment,

which is charged with the duty of building a city hall for the use of the city, has power to issue bonds for that purpose, and is constituted a trustee for the bondholders.

It is not claimed that the building or leasing of a city hall by a city is not legal and proper, as a municipal act. Spaulding *v.* City of Lowell, 23 Pick. 71; Stetson *v.* Kempton, 13 Mass. 278; State *v.* Haynes, 72 Mo. 377; People *v.* Mononey, 4 Cal. 9; Halbut *v.* Forrest City, 34 Ark. 246; Eastman *v.* Meredith, 36 N. H. 295; Town of Beaver Dam *v.* Frings, 17 Wis. 398; Torrent *v.* Muskegon, 47 Mich. 115, 10 N. W. 132; People *v.* Green, 64 N. Y. 499; Mayor, etc., *v.* McWilliams, 67 Ga. 106; Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689.

It is admitted that the primary object of the proposed city hall will be for the city's use. If the hall, which shall be adapted for meetings of the citizens for municipal, political, and other purposes, shall at the same time be fitted so that it can be used as a theater, or for purposes of amusement, when not needed for the use of the city, and thereby produce an income for the city's benefit, I think the erection of the city hall is no less within the scope of legitimate municipal purpose. Such seems to be the nearly universal practice in this and other states, and such is the result of the decided cases. French *v.* Quincy, 3 Allen, 9; Worden *v.* City of New Bedford, 131 Mass. 23; Jones *v.* Sanford, 66 Me. 585; Stetson *v.* Kempton, *supra;* Halbut *v.* Forrest City, *supra.*

To call this act a "scheme" or "artifice" does not add to the weight of the argument. Much private legislation consists of "schemes." The wit of men is all the time being exercised in accomplishing new results by new means, within legal limits. If needed public improvements, if the ownership of public water supplies, and the like, by a town or city, can be accomplished only by a "scheme" like this, and that without infringing upon the constitutional amendment, or becoming subject to the evils which that amendment was intended to prevent, then it is to the credit of the legislature that a "scheme" has been devised.

The question is whether any of the specific provisions of the act are within the inhibition of the constitution. Does the grant of authority to the city to convey its old city hall lot to the commission in trust, or to the commission to issue bonds, or the requirement of an annual tax to pay "all expenses for repairs, insurance, and management" and an annual rental of the building, or the requirement that the "revenue derived from the building shall be invested in a sinking fund to be used for the purchase of the bonds," tend to "increase the debt or liability" of the city?

The language of the constitution is clear. No refinement of language can make it more so. Of its absolute wisdom no one can doubt. Its purpose is equally clear. It is easy to read it in the light of the history of the state. Municipalities of taxpayers can in most instances safely be left to tax themselves, but occasionally a wild and unwarranted enthusiasm attacks a community, as it does an individual. In the years just prior to the adoption of this constitutional amendment many towns in this state had incautiously lent their aid to what were thought to be improvements, notably unsuccessful railroads, and in doing so had incurred so great indebtedness that insolvency was the result, and liquidation was resorted to. This indebtedness was piled up to be met by future taxation, in some cases by a future generation; but, like all "debts," it was to be paid, and it could be paid only by municipal taxation. It was, therefore, to prevent municipalities from incurring debts or liabilities (beyond the limit) that must be paid by future taxation, which was the object of the constitutional amendment. Burdens must not be created in the present to be laid upon the shoulders of future taxpayers. A "debt" is what is owed, and must be paid. It is claimed that the word "liability" is more significant in this instance. A definition which is ample for the purpose of construing the constitution is, "The condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden." Stand. Dict. It will be easily perceived that this definition involves the idea of an ultimate pay day.

To be liable, in this sense, is to be financially responsible; to be obliged to pay, at least upon a contingency. To be "liable" is to be bound, in the present, to pay, in the future, certainly or upon a contingency. So defined, the constitution accomplishes its full purpose. It has protected overconfident communities from themselves, and has been and is a strong bulwark of our municipal credit. But it never was intended to prevent a municipality from acquiring for itself such advantages as it can, by any "scheme" or "artifice," which does not create or pile up a debt or liability now which must be paid by it by and by.

1. Is the provision authorizing the conveyance of the old city hall lot to the commission in contravention of the constitutional amendment referred to? I do not think so. As has already been said, the city hall commission is a legal and proper municipal instrumentality. It was competent for the legislature to create it. The act merely authorizes the transfer of a piece of municipal property, created for municipal uses, from one municipal corporation to another municipal corporation, to be used for the same purpose by the same people. Both corporations are a part of the municipal machinery of the same city. The real beneficiaries are not changed. The act simply permits a change in the agency by which the public purpose is to be accomplished. Analogous statutes are frequent. By a recent statute in this state, all the property of school districts, each a separate and distinct municipal corporation, was transferred, *nolens volens*, to the towns in which they were situated. The right to do so has not been questioned. Much more is this permissive act legal. But it is said that this property was to be conveyed in trust to another corporation to secure its debts. True, but the other corporation was but another instrumentality of the same municipality. Not only does the legislature have power to change, modify, or limit municipal corporations, but it can control the use and disposition of municipal property, or so much of it as is acquired for and applied to public

municipal uses. Inhabitants of North Yarmouth *v.* Skillings, 45 Me. 133; Weymouth & B. Fire Dist. *v.* Norfolk Co. Com'rs., 108 Mass. 142; Whitney *v.* Stow, 111 Mass. 368; *In re* Kingman, 153 Mass. 566, 27 N. E. 778; Meriwether *v.* Garrett, 102 U. S. 472; Mt. Hope Cemetery *v.* City of Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515, *note;* Richland Co. *v.* Lawrence Co., 12 Ill. 8; Harris *v.* Board, 105 Ill. 445; Mayor of Baltimore *v.* State, 15 Md. 370; Coyle *v.* McIntire, 7 Houst. 44, 30 Atl. 728.

Some courts have gone so far as to say that the legislature may divert municipal property to other and different uses from those to which it has been applied by the municipality itself. City of Indianapolis *v.* Indianapolis Home for Friendless Women, 50 Ind. 215. See *note* to Mt. Hope Cemetery *v.* City of Boston, 35 Am. St. Rep., at page 536 (s. c. 158 Mass. 509, 33 N. E. 695.)

If the legislature may require an absolute conveyance of such property by a city to another municipal corporation, to be used for the same purpose, can it not permit the conveyance in trust, reserving to the city what may be called an equity of redemption? I think it can. It must be remembered that it lies with the legislature to determine how and upon what terms and conditions, and for what purposes, a municipal corporation may hold property.

It is claimed, in argument, that the act is unconstitutional so far as the authorized conveyance of the city hall lot in trust is concerned, because thereby the property of the city is made subject to the lien of the bonds, and, in case of default, it may be sold, and the proceeds applied to the payment of the bonds, and in this way the city is liable to lose its property.

It is not clear that such a possibility would render the act invalid. The act is permissive. The legislature merely gives the authority. And when the legislature and the municipality affected both agree as to the wisdom of the proposed proceedings, I am unable to see how it infringes upon any provision of the organic law. But a sufficient answer to

this objection is that it is at all times within the power of the city, by the legitimate exercise of the power of taxation, to provide for the payment of the bonds, and so prevent a forfeiture or loss. The amount of the bonds, the rate of interest, and the time or times when they shall mature, are all subject to the approval of the city, and it certainly has it within its power to make such provisions that even the payment of the debt of the city hall commission, from time to time, by money raised by taxation, would not be extremely onerous.

It is claimed, further, that the subtraction of a portion of the municipal assets of the city is, in effect, increasing its "debt or liability," inasmuch as it lessens the means from which the city can derive funds for the payment of its debts. A plain reading of the constitution does not lead to this result. A city is forbidden to "increase its debt or liability," entirely irrespective of its assets. They may be more, or they may be less. If diminishing the assets increases the debt, so increasing the assets ought to diminish the debt. But it is not so. The prohibition is absolute as to the debts. The amount of a person's debts is in no way contingent upon the amount of his assets. His debts are not increased by selling his assets.

In computing indebtedness, to ascertain whether it is within the limit, the courts do not permit the deduction of assets. The debt stands alone. Lovejoy *v.* Inhabitants of Foxcroft, 91 Me. 367, 40 Atl. 141. Even cash in the treasury for the purpose of paying bonds cannot be deducted. City of Waxahachie *v.* Brown, 67 Tex. 519, 4 S. W. 207.

So neither can uncollected taxes nor the levy for the present year be deducted. City of Council Bluffs *v.* Stewart, 51 Iowa, 385, 1 N. W. 628.

A case in point is Fowler *v.* City of Superior, 85 Wis. 411, 54 N. W. 800. The city of Superior issued its improvement bonds, containing an unconditional promise of the city to pay. The bonds were made "payable out of the proceeds of certain improvement assessments," were "issued upon the faith and credit of said assessments," and "their payment was made

chargeable upon the property benefited by said improvements." It was held that the bonds constituted an indebtedness of the city, within the meaning of the constitutional limitation. The court said: "It is the indebtedness of the city the constitution limits, and nothing else can be considered than that. * * * The language of the constitution, 'become indebted in any manner or for any purpose,' is to be understood in its commonly accepted sense. Cannot one become indebted if he has pecuniary resources sufficient to pay it?"

The same general considerations which apply to the provision for the conveyance of the city hall lot also apply to the requirement that the revenues from the building shall be invested in a sinking fund to be used for the purchase of bonds issued by the commission. This revenue, as earned, becomes municipal property. Placing it in a sinking fund does not, for reasons already stated, increase the city debt or liability. The legislature, especially with the assent of the city, which was given by accepting the act, may well impose a trust upon this revenue, when its purpose is to relieve the burden of debt from a property in which the city has an equitable interest. Indeed, it may be said that the trust attaches to the money as earned, and that the city never will have any title to it except subject to the trust. Would it not be clearly within the power of the legislature to require a city to set aside any income derived by it from its own income-producing property, in order to create a fund to be used for proper municipal purposes? And, if so, why may not the city be required to set aside the income of this trust property, and apply it in time to the payment of the liens upon it? It is difficult to see how any municipal debt or liability is created thereby, and, unless a debt or liability is created thereby, the propriety of the sinking fund provision is a question which addresses itself to the legislature, and not to the court.

But it is said that the provision in the act creating a sinking fund contemplates the raising of money for it, not only by taxation, but by other means; as, for instance, by bor-

rowing. Certainly, there is no constitutional objection to that, if at the time of borrowing the city has the constitutional power to do so, just as any city or town may hire money to build a hall if it can do so within its debt limit. To authorize a city to borrow money may give opportunity for the "tyranny practiced by majorities," but it is a tyranny which is necessarily incidental to the right of the majority to govern. And the wisdom or unwisdom of bestowing that power upon the majority is a matter which is addressed to the legislature. To that body, and not to the court, is confided the power to add to and subtract from the rights and privileges of municipalities.

It is now the general law of this state that towns and cities may create sinking funds by taxation. Laws 1897, c. 208. See Waterworks *v.* Woodward, 49 Iowa, 58.

2. The complainants argue that the city may ultimately be liable for the payment of the bonds issued by the commission; that there is at least an implied liability, which is as obnoxious to the constitution as an express liability. I am unable to see how this can be so, unless the commission is the agent of the city for the purpose of issuing bonds. But the whole purport or this act is that the city shall not be liable for the bonds of the commission. The legislature can undoubtedly create an agent for whose acts the city would be liable, but I think it did not do so in this case. Nothing can be clearer than the purpose of the legislature that the bondholders should look to the property alone for the payment of the principal of the debt.

The city hall commission is created a body corporate and politic. It has a seal. It can sue and be sued. It has a separate legal entity. It is a corporation entirely distinct from the municipal corporation of Waterville. It is true that the persons composing the commission may be chosen by the city, and that the city may prescribe its powers and duties, not inconsistent with the act of incorporation; but these are matters of mere corporate machinery, as I have already said, designed to protect the equitable interest of the

city in the trust property. The bonds, if issued, will be the corporate bonds of the city hall commission. The security and the mode of enforcement are both prescribed by statute. The only liability the city will be under is that of losing its equitable interest in the property in case of nonpayment of the bonds, and that is a possibility, or, at the worst, a likelihood, rather than a constitutional liability or financial responsibility, as already defined in this opinion. And the city at all times has the legal power to prevent any such possibility by levying a tax. The city hall commission is a municipal agency, but it is not the agent of the other municipal corporation, the city, in the issuing of bonds. And such bonds will not be a debt or liability whereof payment by the city can be enforced. West Chicago Park Com'rs *v.* City of Chicago, 152 Ill. 392, 38 N. E. 697. The reasoning in Adams *v.* Institution, 136 N. Y. 52, 32 N. E. 622, is applicable to this question. "The power of the county or city, as the case may be, is restricted only by the amount of its own debt; and for the purpose of creating a disability against the one or the other the debts of both cannot be aggregated." See Wilson *v.* Board, *supra*, and other cases cited in same connection.

A contract to build a sewer, by which the contractor was to receive certificates of assessments upon abutting owners of adjacent property in full payment, was held not to create a debt within the meaning of the constitutional limitation. Davis *v.* City of Des Moines, 71 Iowa, 500, 32 N. W. 470. Where a city council could not authorize expenditures for the current year beyond the limit fixed by the charter, a contract for grading and paving, not to be completed within the municipal year, and beyond the limit for the current year, was held valid. Weston *v.* City of Syracuse, 17 N. Y. 110.

The act, as I understand it, provides that the commission shall hire the money, and the debt will be the debt of the commission. The case of Mayor, etc., *v.* Gill, 31 Md. 375, which is sometimes cited upon this general question, and adversely to the ground I take, is a good illustration of the

distinction which I think should be made. In that case the court held that when an ordinance provides that $1,000,000 shall be raised by the pledge or hypothecation of stock held by the city, it is substantially the same thing as if it provided in terms for borrowing the money. To raise money on a pledge is to borrow it, and the party from whom it is obtained actually loans it, although in the ordinance it is called "furnishing" the money; and this is the result, though it is provided that the parties loaning the money shall look for its repayment exclusively to the stock pledged, and that in no event is the city to be liable or responsible for the return or repayment of any part thereof, even though the stock pledged should prove insufficient. The court said: "A debt is money due upon a contract, without reference to the question of the remedy for its collection. It is not essential to the creation of a debt that the borrower should be liable to be sued therefor." In that case the city made the contract and borrowed the money, and thereby created a debt. That was the gist of the decision. In this case a submunicipal corporation, which the legislature had authority to call into being, makes the contract and borrows the money. Such corporations and such contracts are sustained, as I have already pointed out, although they accomplish indirectly for the people of the city what the city cannot do itself.

But it is said that the city would be liable to proceedings by *mandamus*. I do not think the city would be liable to proceedings by *mandamus* to aid in the recovery of the debt, for, unless there is a liability for the debt, no proceedings whatever against the city, looking to its recovery, would lie. That *mandamus* might lie to compel it to meet the annual charges, I concede. There is no provision in the act which requires the city to raise any money whatever at any time except "such sum or sums as may be necessary to pay all expenses for repairs, insurance, and management of the building, together with an annual rental of the building in a sum equal to the annual interest on the bonds issued and outstanding." There is no requirement that the city shall

pay any portion of the debt, or raise any money to contribute to the sinking fund. Creditors who take the bonds would have to take them subject to the provisions of the act.

3. The complainants claim that the provisions for raising money by taxation annually to pay expenses and rental creates in the present a debt or liability to be paid in the future, that the amount of such debt is the aggregate of the payments to be made.

The opinion of the court admits that a town may make time contracts in order to provide for certain municipal wants which involve only the ordinary current expenses of the municipal administration, provided there is to be no payment or liability until the services be furnished, and then to be met by annual appropriations and levy of taxes; and also that such a time contract can be made for the use of a hall for a term of years to be used for strictly municipal purposes.

This may cover all that is sought to be done under the act in question. But, if not, I wish to say that such an arrangement as is contemplated by the act is well supported by the authorities. I think that a city may contract for a definite term or an indefinite period for such current municipal expenses as this act provides for, if provision is made by law requiring the raising annually by taxation of the amount necessary to pay such expenses as they accrue. Atlantic City Waterworks Co. *v.* Atlantic City, 48 N. J. Law, 378, 6 Atl. 24; East St. Louis *v.* East St. Louis Gaslight & Coke Co., 98 Ill. 415,— where it was held that the aggregate future payments were not a present indebtedness.

In Grant *v.* City of Davenport, 36 Iowa, 396, in case of a water contract for a term of years, it was said: "A city already indebted to the maximum limit * * * may rent real estate and buildings (suitable for its officers) for a like use, and agree to pay a reasonable rent therefor. Such a contract would not be creating an indebtedness, but is a cash transaction, and the length of time the contract is to continue does not alter the effect. * * * Where the

contract made by the municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not incur an incurring of indebtedness within the constitutional prohibition."

See City of Valparaiso *v.* Gardner, 97 Ind. 1; Waterworks *v.* Woodward, 49 Iowa, 58; Walla Walla Water Co. *v.* City of Walla Walla, 60 Fed. 957; Wade *v.* Oakmont Borough, 165 Pa. St. 479, 30 Atl. 959; Merrill Railway & Lighting Co. *v.* City of Merrill, 80 Wis. 358, 49 N. W. 965; Crowder *v.* Town of Sullivan, 128 Ind. 486, 28 N. E. 94; New Orleans Gas Co. *v.* City of New Orleans (La.) 7 South. 559; Smith *v.* Dedham, 144 Mass. 177, 10 N. E. 782; Appeal of City of Erie, 91 Pa. St. 398; State *v.* Atlantic City, 49 N. J. Law, 558, 9 Atl. 759; Keihl *v.* City of South Bend, 22 C. C. A. 618, 76 Fed. 921; City of La Porte *v.* Gamewell Fire-Alarm Tel. Co. (Ind. Sup.) 45 N. E. 588; Hay *v.* City of Springfield, 64 Ill. App. 671; Quill *v.* City of Indianapolis, 124 Ind. 292, 23 N. E. 788.

While the rent required by this act to be paid is arbitrarily fixed, it does not seem to be unreasonable in amount, as rent. And if the amount is fixed by the legislature, and assented to by the city, and the amount is required to be raised annually by taxation, I think the statute provision requiring it should be held constitutional. It is not a contribution towards the principal part of the cost of the building. It is not a paying for the building in installments. It is merely a payment of the interest upon the costs of so much of the property as is represented by the building, together with expenses of maintenance; and that may be regarded as a reasonable rental. There would be an obligation to pay only when, and as fast as, the consideration was received.

It is generally held that the state can direct a town to make municipal improvements, and can lawfully impose a tax upon the property of the citizens of the town to pay the neces-

sary expenses. People *v.* Flagg, 46 N. Y. 401; Thomas *v.* Leland, 24 Wend. 65; Easton & A. R. Co. *v.* Central R. Co., 52 N. J. Law, 267, 19 Atl. 722; Guilder *v.* Otsego, 20 Minn. 59; Carter *v.* Bridge Proprietors, 104 Mass. 236; Kirby *v.* Shaw, 19 Pa. St. 258; Cooley, Const. Lim. § 230.

A familiar illustration, in this state, of the power of the state to compel towns to raise money by taxation for specific purposes is found in the requirement that "every town shall raise and expend, annually, for the support of schools therein, * * * not less than eighty cents for each inhabitant." Rev. St. c. 11, § 6.

For these reasons I think that the act creating the city hall commission of Waterville did not infringe upon any constitutional provision, and that the bill should have been dismissed.

NOTES.

Indebtedness in Excess of Constitutional Limitation—Injunction by Taxpayer.—A taxpayer has sufficient interest to enable him to maintain a suit to enjoin the municipal authorities from entering into a contract which will create an indebtedness in excess of the constitutional limit. Springfield *v.* Edwards, 84 Ill. 626; Valparaiso *v.* Gardner, 7 Am. & Eng. Corp. Cas. 626, 49 Am. Rep. 416, 97 Ind. 1. But in Searle *v.* Abraham, 23 Iowa, 507, it was held that in order to entitle a taxpayer to maintain such an action, it must be shown that he would sustain injury by the contemplated action of the municipality.

A taxpayer can maintain a suit to enjoin the municipality from carrying out such a contract: Davenport *v.* Kleinschmidt (Mont.), 16 Am. & Eng. Corp. Cas. 301; from issuing bonds in excess of the constitutional limit; Wilkinson *v.* Van Orman, 70 Iowa, 230; or from levying and collecting a tax for the purpose of paying the indebtedness incurred. Howell *v.* Peoria, 90 Ill. 104.

If an action is brought against the municipal authorities to compel them to levy a tax for the payment of an indebtedness in excess of the constitutional limit, a taxpayer is entitled to intervene and defend if the municipal authorities refuse to set up the defense. Richards *v.* Supervisors of Lyon County, 69 Iowa, 612. See also State *ex rel.* Orr *v.* City of New Orleans (La.), *ante*, p. 122 and *notes*, p. 142. See generally 2 Dill. (4th Ed.) § 914.

Boltz *v.* Town of Sullivan

Same—Assessment to be Followed in Ascertaining Validity.—The Illinois constitution provides that counties shall not contract indebtedness in excess of five per cent. of the taxable property ascertained by the "last assessment for State and county taxes previous to the incurring of such indebtedness." *Held*, that the limit of indebtedness is to be ascertained by reference to the assessments made by the local assessors, and not by reference to the "equalized valuation" fixed by the State board of equalization. People *v.* Hamill (Ill.), 22 Am. & Eng. Corp. Cas. 39.

But in State *ex rel.* Vandiver *et al. v.* Tolly (So. Car.), 40 Am. & Eng. Corp. Cas. 536, it was held that where a constitution provides that the bonded debt of a municipality shall not exceed a certain per cent of the assessed value of its taxable property, the regular annual assessment for the purpose of taxation must be used as the basis for issuing bonds, and not a special estimate of the value of the taxable property made by a committee appointed by the city council, for the very purpose of showing that the amount of the bonds which it was desired to issue would not create a debt exceeding in amount the constitutional limit.

BOLTZ

v.

TOWN OF SULLIVAN.

(*Supreme Court of Wisconsin, Jan. 10, 1899.*)

Personal Injuries—Highways—Obstructions—Liability of Town.*—While a person in the exercise of ordinary care was driving on a public highway, riding in a road cart drawn by a single horse, the horse, in order to avoid a mud puddle, or for some other reason, suddenly swerved to the right-hand path, causing the right wheel of the road cart to track outside the traveled part of the way a few inches, and strike a stump which had there existed since the original construction of the road. *Held:*

The following instruction to the jury was proper: "If the town officers knew, or by the exercise of ordinary diligence ought to have known, that the stump existed so near the traveled track as to render the highway dangerously defective for the use of travelers in

*See notes at end of case.

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the exercise of ordinary care, and plaintiff in the exercise of such care drove against it and was injured, the town is liable."

Immaterial Facts.—The character of the defect and the length of time it had existed were entirely immaterial except as clearly covered by the instruction.

Knowledge of Officers.—The defect having existed from the time of the original preparation of the highway for public use, the town was bound to have known of its existence. Proof of notice to the town officers was not required.

Question of Fact.—The defect not being so far outside the traveled track that a traveler would have been obliged to have actually left such track in order to have reached it, it could not be said as a matter of law that it did not render the highway actionably defective.

Damages.—The following instruction was proper: "You are allowed to give such damages for bodily pain and mental anxiety as you believe the plaintiff is justly entitled to recover," in connection with the instruction that, "The damages should be no greater and no less than you believe from the testimony the plaintiff is entitled to receive," the idea being that the assessment of damages should be made solely upon the testimony produced on the trial.

Contributory Negligence.—The mere accidental deviation from the traveled way, by the swerving of the horse to one side of such way to avoid a mud puddle, or deviation because of the natural inclination of the horse to travel in one of the foot paths instead of on the crown of the road, thereby causing the wheels to run outside the track for a few inches, does not come within the rule that if a person, for his own convenience and without cause, drive outside the way prepared for travel, and thereby reach an obstruction in the road and receive an injury, the municipality is not liable.

Counsel Reading Law to Jury.—It is improper for counsel in a case to read law or other books to a jury, and a trial judge ought firmly to prohibit it; but if he fail to do so, the error must be regarded as harmless unless it clearly appear that the objecting party was prejudiced thereby.

(Syllabus by the Judge.)

APPEAL by defendant from Jefferson county circuit court. *Affirmed.*

Action to recover compensation for personal injuries. The evidence, following the allegations of the complaint, showed

that plaintiff while traveling on a road in the daytime, in a roadcart drawn by one horse driven by her son, was thrown from the seat upon the dashboard and the left wheel, and seriously injured by reason of the right wheel of the roadcart striking a small stump that was concealed in the weeds a short distance outside of the right-hand wheel track. The road was an ordinary country turnpike. The tree was cut before the grading was done, and the stump, by the grading, was partially buried beneath the surface. The weeds grew up around it along the side of the road so that it was not readily observable by a traveler circumstanced as plaintiff was. The controverted questions of fact on the trial were whether the stump was so located as regards the traveled track and of such a character as to constitute an actionable defect in the highway, and whether the town officers were chargeable with knowledge of its existence. There was evidence tending to show that the stump was five to six inches from the right wheel track, was eight inches high, and seven to eight inches in diameter, and there were indications that it had been run over by wagon wheels before. There was evidence tending to show that there was a mudhole in the road near the stump and that about as the horse arrived at the place of the accident he swerved to the right to avoid the mudhole, thereby running the right wheel out of the wheel track a sufficient distance to strike the stump. There were some rulings on request to instruct the jury, and some exceptions taken to refusals to instruct. On the argument plaintiff's counsel was permitted, against objection by defendant's counsel, to read a portion of the opinion of this court in Wheeler *v.* Town of Westport, 30 Wis. 392. The verdict was for plaintiff, which defendant's counsel moved the court to vacate as unsupported by the evidence. The motion was denied and due exception was taken to the ruling. The appeal is from the judgment rendered on the verdict in plaintiff's favor.

Case Stated.

Harlow Pease, for appellant.

R. B. Kirkland, for respondent.

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MARSHALL, J. (after stating the facts). The jury were instructed in substance that, if the town officers knew, or by the exercise of ordinary diligence might have known, that the stump existed so near the traveled track as to render the highway dangerously defective for the use of travelers in the exercise of ordinary care, and plaintiff in the exercise of ordinary care drove against it and was injured, the town is liable. That appears to be faultless, but appellant's counsel complains of it, because it ignored the character of the defect and the length of time it may have existed, relying upon some language used in the opinion in Cooper *v.* City of Milwaukee, 97 Wis. 458, 72 N. W. 1130. The point there considered was whether the court erred in instructing the jury to answer in the affirmative an interrogatory as to whether the officers of a municipality were guilty of negligence in respect to failing to repair the alleged defect, "if the sidewalk at the point in question was defective, and the jury finds the city officers knew or ought to have known in the exercise of proper care of the existence of such defective condition, in the absence of evidence tending to show that any steps were ever taken to remedy it." Following that is language in the opinion which the learned counsel here seeks to apply to his situation, and not without some reason. The following is the language: "This instruction was given without respect to the length of time the defect had existed, or its character." Following that are observations quite likely to mislead, at least unless viewed in the light of the precise point decided. They were based on Duncan *v.* City of Philadelphia, 173 Pa. St. 550, 34 Atl. 235, where the defect was in the cover of a coal hole, and of such a character that it was not discoverable without taking off the cover to examine it. The trial court refused to instruct the jury that the public officers could not be charged with implied notice of a defect merely from its existence if it was not discoverable without removing and examining objects apparently and properly in place, but did charge the jury that the de-

Personal Injuries—Highways—Obstructions—Liability of Town.

fendant could not be held actionably negligent unless the officers knew of the defect or it had existed so long that the city would or should know it. The court on appeal said, the defendant had a right on request being made therefor, to have the character of the defect pointed out, requisite to charge public officers with notice of its existence. Thus viewing the court's language with reference to the ruling condemned, that the defendant had a right to have the jury instructed that the existence of a defect not discoverable by observation without disturbing objects apparently and properly in place, is not sufficient to charge public officers with knowledge of it, the same rule is not applicable strictly to Cooper *v.* City of Milwaukee, because the court was not requested to qualify the general instruction, which, as said in Duncan *v.* City of Philadelphia, was good as far as it went. It was a correct statement of the law and there was no error merely because it did not state qualifications or limitations, there being no request for more explicit instructions. Weisenberg *v.* City of Appleton, 26 Wis. 56; Austin *v.* Moe, 68 Wis. 458, 32 N. W. 760; McCormick *v.* Louden, 64 Minn. 509, 67 N. W. 366; Hanson *v.* Gaar, Scott & Co. (Minn.) 70 N. W. 853. The instruction to the jury in Cooper *v.* City of Milwaukee, was correct. It was not intended to be condemned as an erroneous statement of the law. The difficulty was that there was no evidence in the case, either of actual knowledge of the defect complained of, or defects that could reasonably have been expected to have conveyed knowledge to the public officers. The instruction was given as if there was evidence to which it could apply, as stated earlier in the same paragraph in these words: "There was no evidence to indicate any defect or tending to show that the cover was out of its socket for a sufficient length of time to have enabled the proper officers of the city to have discovered its condition and replaced it." It was want of evidence that the assignment of error under discussion turned on, and anything said in the opinion which may be construed as condemning the charge referred to therein, except for want of

evidence to render it proper and which led counsel for appellant to cite the case as condemnatory of the charge under discussion here, was not so intended by the court. The charge was right as an abstract proposition of law, so the similar charge was in Duncan *v.* City of Philadelphia, so is the charge here.

Damages.

The jury were instructed as follows: "You are allowed to give such damages for bodily pain and mental anxiety as you believe the plaintiff is justly entitled to recover." It is said that left on the minds of the jury the impression that they could determine the fact without the aid of evidence. That criticism is certainly not warranted in view of the fact that the language is followed immediately by the following: "The damages should be no greater and no less than you really believe from the testimony the plaintiff is entitled to receive." That was a plain, clear statement to the jury that they could award such damages for the elements mentioned as they believed the plaintiff was justly entitled to receive, determining the same, however, solely upon the testimony produced on the trial.

Knowledge of Officers.

It is said the verdict should have been set aside as contrary to the evidence, because there was no evidence whatever to charge the officers of the town with notice of the defect if it were one. The statutory liability for injuries to persons caused by the insufficiency of a highway, under section 1339, Rev. St., is not subject to any exception found in the letter of it. It is held by courts that an injury caused by the concurrence of a defect in the highway and contributory negligence of the injured person, cannot be attributed with reasonable certainty to either element of negligence, therefore that the principle of contributory negligence precludes a recovery in an action for damages caused by the insufficiency of a highway, the same as in any other case of the concurrence of two responsible causes; one is negligence of a wrongdoer, and the other of the injured person. That is because the exception is a rule of the common law and not clearly obviated by the statute.

Again, by equitable construction, going back so far in this state that it is now as much a part of the statute as if expressed therein as a qualification of it, notice, either actual or constructive, of an insufficiency happening after the construction of a highway, is necessary to fix upon the municipality liability for personal injuries caused thereby. The requisite of notice has no application, however, to defects in the original construction of a highway or to defects open and discoverable with ordinary care, in the original preparation of the road for public use. Ward *v.* Town of Jefferson, 24 Wis. 342; Elliott, Roads & S. 644. Hence the circumstances as to the character of the insufficiency, and the time when it was created, in this case do not fall within the exception to the statute. If it was an actionable defect, then clearly, from the evidence, it was a defect in the original preparation of the road for use, and therefore attributable to the town officers themselves, so there was no question of notice in the case for submission to the jury.

Immaterial Facts

But it is said a town is not obliged to keep the whole width of the highway in a safe condition for public travel; that if it prepare a sufficient space for that purpose its duty is fully performed, and if even the road be too narrow, yet the traveler leave the traveled track without cause and thereby reach a defect and receive injury thereby, the town is not liable. That is good law but does not appear to apply to this case. The stump was so near the traveled track that it was not necessary for the vehicle to really leave the road or course of travel in order to reach it, therefore it was at least a question for the jury to say whether the defect was actionable or not by reason of its being sufficiently near the traveled track to render the use of the space prepared for travel dangerous for persons using the same in the exercise of ordinary care. Gorr *v.* Mittlestaedt, 96 Wis. 296, 71 N. W. 656. The evidence strongly tends to show that the defect was so near the wheel track that a mere shying of the horse or his swerving to one side for an in-

Question of Fact.

Contributory Negligence.

stant, or traveling on one side as a single horse is quite liable to do, and at least without negligence on the part of the driver as a matter of law, was liable to cause the wheel to strike it with dangerous results to the occupants of the vehicle. The evidence tends to show that such was the way in which the accident happened. The trial court could not say as a matter of law that the case was within the rule that where a person voluntarily diverges from the traveled track without reasonable cause he assumes the risk of his conduct. There is evidence here that the horse suddenly shied or swerved to the right-hand side of the road in order to avoid a mudhole and thereby ran the right wheel a few inches outside of the wheel track and against the stump.

What has been said covers all the assignments of error made by appellant's counsel, except that the court permitted plaintiff's counsel to read to the jury an extract from the opinion of CHIEF JUSTICE DIXON in Wheeler *v.* Town of Westport, 30 Wis. 392. That was objected to and the court, after ruling that it was improper, said, in effect, that the reading might proceed as a part of the argument of plaintiff's counsel, but at his peril. We should say here in passing, with due respect for the learned judge who presided at the trial, that for the instant he hardly met with proper judicial firmness the situation presented. The reading proposed was not proper. The court appreciated that fact and so ruled, and then laid aside for the moment that judicial order which should at all times govern a trial, and informed counsel that he might put error into the record if he chose but must take the consequences. It is permissible and excusable for courts to err if done honestly and inadvertently. All do it, none are infallible; but duty to litigants and the careful administration of the law are inconsistent with knowingly permitting, against proper objections, improper conduct on a trial at any point, even if the trespasser upon the rules be willing to take his chances on the result in his favor being disturbed because of such conduct.

Counsel Reading Law to Jury.

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The reading of legal opinions or the law as laid down by text-writers, or reading from other books or papers, for the purpose of influencing a jury in a case on trial is generally held to be improper. Facts are to be established by evidence given in court from the mouths of witnesses, or depositions taken out of court, or papers and records and things properly produced. The law applicable to the case is to be pronounced by the trial court upon the bench. The arguments of counsel to the jury are to be confined to reasoning, and the drawing of deductions from the evidence in the light of the law as counsel assumes the court will pronounce it. In that light he is to reason from the evidence as to the facts which, to his mind, such evidence establishes, and which the jury should say it establishes. The following authorities may be referred to, among the numerous decisions of courts on the subject of reading from law books and the decisions of courts, or other books, to juries: Baker *v.* City of Madison, 62 Wis. 137, 22 N. W. 141, 583; Mullen *v.* Reinig, 72 Wis. 388, 39 N. W. 861; Boyle *v.* State, 57 Wis. 472, 15 N. W. 827; Ashworth *v.* Kittridge, 12 Cush. 193; Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882; Com. *v.* Sturtivant, 117 Mass. 122; Com. *v.* Brown, 121 Mass. 69; Whiton *v.* Insurance Co., 109 Mass. 24; Huffman *v.* Click, 77 N. C. 55; Gregory's Adm'r *v.* Railroad Co., 37 W. Va. 606, 16 S. E. 819; Railway Co. *v.* Wesch (Tex. Civ. App.) 21 S. W. 62; Steffenson *v.* Railway Co., 48 Minn. 285, 51 N. W. 610; Railway Co. *v.* King, 88 Ga. 443, 14 S. E. 708; Williams *v.* Railway Co., 126 N. Y. 96, 26 N. E. 1048; Humbarger *v.* Carey (Ind. Sup.) 44 N. E. 302; Stratton *v.* Dole (Neb.) 63 N. W. 875; Telegraph Co. *v.* Teague (Tex. Civ. App.) 27 S. W. 958; Publishing Co. *v.* McDonald, 11 C. C. A. 155, 63 Fed. 238; Dillingham *v.* Wood (Tex. Civ. App.) 27 S. W. 1074; Wolf *v.* Shannon, 50 Ill. App. 396; Edwards *v.* Common Council of Village of Three Rivers, 96 Mich. 625, 55 N. W. 1003.

It will be seen by an examination of the cases cited that while the reading of law to a jury is generally condemned, it is generally held not reversible error unless the jury be

thereby prejudiced, or it appear clearly that such was probably the effect. That is obviously the rule that should govern here in view of section 2829, Rev. St., which provides that the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect a substantial right of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect. The significance of that provision has often been referred to by this court. DIXON, C. J., in Decker *v.* Trilling, 24 Wis. 610, observed that it is a beneficent statute and cures a multitude of errors, as numerous cases in which it has been acted upon by this court will show; and in Pooler *v.* State, 97 Wis. 627–638, 73 N. W. 336, it was remarked that the intent of the statute should always be recognized and given its legitimate effect to the end that justice be made certain and speedy instead of being unnecessarily delayed and made burdensome to parties by disturbing judgments, where a complaining party has in no way been prejudiced as to any substantial right.

Looking at what counsel for respondent read to the jury, which is the subject of the assignment of error, we are unable to see clearly how appellant could have been prejudiced thereby. There was first a correct statement of the legal test of liability for negligence, which was followed by a substantially correct quotation from the statute as to the liability of towns to persons injured while traveling on public ways, if injured by the insufficiency thereof; then a correct statement of the duty of towns to make and keep their highways reasonably safe, and that a highway is not sufficient if not reasonably safe; then followed an accurate quotation from CHIEF JUSTICE DIXON'S language in the Westport Case as to conditions, naming them, which may render a highway insufficient under some circumstances and not under others, closing with the words: "It is with respect to conditions and considerations like these, and others which will readily suggest themselves, that highways are stated to be safe and sufficient, or unsafe and insufficient, according to circum-

Notes

stances." If the counsel had argued that, as a matter of common sense and common knowledge, the considerations named were the proper tests of the sufficiency of a highway, and put the statement of the law on counsel's assumption as to its correctness, and as to what the court would instruct the jury from the bench, and made his deductions from all the evidence from premises thus stated, it would not be claimed, we apprehend, that such conduct constituted reversible error if error at all. The mere fact that the same language was used by quoting from a legal opinion cannot be said to so far change the situation as to constitute prejudicial or reversible error, inasmuch as all that was said if stated as the language of the counsel, legitimately applied to the case. By this we by no means approve the proceeding of the trial court. We disapprove of it, yet it is one of many matters liable to occur in trials, which, though out of harmony with correct methods, do not warrant punishing parties by reversing their judgments. This court can go no further in such situations than to express disapproval and hold the error harmless, leaving trial courts to make their own standard of strictness as to the observation of settled rules and methods of procedure in conducting trials, so long as no substantial right of a complaining party be injuriously affected thereby.

The judgment of the circuit court is affirmed.

NOTES.

Defective Streets—Liability of Municipality.—See City of Circleville *v.* Sohn (Ohio, 1898), *ante*, and *note*.

Same—Duty to Repair—Public May Use Entire Width.—"Although the highway be of varying and unequal width between fences, on each side, the right of passage or way, *prima facie* and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as the highway, and are not confined to the parts which may be metalled or kept in repair for the more convenient use of carriages or foot-passengers." The Queen *v.* United Kingdom Tel. Co., 3 F. & F. 74; Tutill *v.* West Ham L. Bd. of H., L. R. 8 C. P. 447; The Queen *v.* Fitzgerald, 39 Up. Can. Q. B. 297.

Notes

In an action for personal injuries caused by an alleged defect in a street, it appeared that on a dark and stormy night the vehicle in which plaintiff was riding collided with a stump, and plaintiff was thrown on the ground, receiving the injuries complained of. The accident occurred on one of the principal thoroughfares of the defendant city, and the stump, which was a large one, had been left standing since the construction of the road, a period of about ten years. *Held*, that a verdict in plaintiff's favor would not be disturbed, though the evidence was conflicting as to the particular location of the stump and its proximity to the traveled roadway. Sebert *v.* Alpena, 78 Mich. 165.

But, as a general rule, where the portion of the highway used for travel is sufficiently wide, only such portion need be kept in repair. Tisdale *v.* Norton, 8 Met. (Mass.) 388; Smith *v.* Wendell, 7 Cush. (Mass.) 498; Shepardson *v.* Colerain, 13 Met. 55; Kellogg *v.* Northampton, 4 Gray (Mass.), 65; s. c. 8 Gray, 504; Howard *v.* No. Bridgewater, 16 Pick. 189; Hayden *v.* Attleborough, 7 Gray, 338; Coggswell *v.* Lexington, 4 Cush. (Mass.) 307; Sparhawk *v.* Salem, 1 Allen, 30; Richards *v.* Enfield, 13 Gray, 344; Rowell *v.* Lowell, 7 Gray, 100; Keith *v.* Easton, 2 Allen, 552; Campbell *v.* Race, 7 Cush. (Mass.) 408, and authorities cited; Morse *v.* Belfast, 77 Me. 44; Kelley *v.* Columbus, 41 Ohio St. 263; Fitzgerald *v.* Berlin, 64 Wis. 203; Bassett *v.* St. Joseph, 53 Mo. 290, 11 Am. Rep. 446; Tritz *v.* Kansas City, 184 Mo. 632; Wellington *v.* Gregson, 31 Kan. 99, 6 Am. & Eng. Corp. Cas. 215, 47 Am. Rep. 482; Perkins *v.* Lafayette, 68 Me. 152; Fulliam *v.* Muscatine, 70 Iowa 436. *Compare* Crystal *v.* Des Moines, 65 Iowa 502; Stafford *v.* Oskaloosa, 64 Iowa 251; Montgomery *v.* Wright, 72 Ala. 411, 5 Am. & Eng. Corp. Cas. 642; Indianapolis *v.* Gaston, 58 Ind. 224; Biggs *v.* Huntington, 32 W. Va. 55, 25 Am. & Eng. Corp. Cas. 63; Roe *v.* Kansas City, 100 Mo. 190. But it was held in Jewhurst *v.* Syracuse, 108 N. Y. (1888), 303, that "where there is no visible boundary to the line of the street, and a portion of the roadway traveled on is so near the actual line (although really outside thereof) as to induce the belief in any one exercising reasonable care that he is within such line, if such portion is for any reason rendered dangerous for travel, and the city has notice thereof in due time, and such danger can be remedied by the exercise of reasonable care, . . . and the city neglects to guard it, we see no reason why it should not be held liable to one who is injured outside of such limits under such circumstances, he being himself free from any neglect contributing to the injury."

GREGG

v.

GOODRICH *et al.*

(*Supreme Court of New Hampshire, March 16, 1894.*)

Election of Mayor—Contests—Powers of City Council.—Under Pub. St. c. 47, § 3, where there is a contest in the election of mayor, the city council has the power to compel the production of the ballots in the hands of the inspectors, to examine them when produced, and to weigh the evidence disclosed by such examination, in determining the result of the election.

City Councils—Committees.*—A city council may intrust such examination and the counting of the ballots to a committee of its own members.

BILL for injunction. *Dismissed.*

John M. Mitchell and *Jeremiah J. Doyle*, for plaintiff.

Charles J. Hamblett, *Edward H. Wason*, and *Frank N. Parsons*, for defendants.

SMITH, J. This is a bill in equity for an injunction restraining the defendants, inspectors of election for the city of Nashua, from producing the ballots cast for mayor at the city election on the first Tuesday after the first Monday in November, 1893, and from allowing them to be unsealed, examined, and counted by the city councils. The bill alleges and the answer admits that the city councils have appointed a joint committee to examine and recount the ballots cast for mayor. The plaintiff, one of the persons voted for, denies the right of the councils to examine the ballots, or go behind the returns made to the city clerk. The duties imposed by statute upon election officers, so far as they need to be stated for the purposes of this case, are as follows: That the moderator count and

Case Stated.

*See note at end of case.

make a public declaration of the votes cast for mayor in his ward, and the clerk make a record of the vote as declared (Pub. St. c. 46, §§ 7, 10; *Id.* c. 33, § 27); that a copy of the record, certified by the moderator, a majority of the selectmen, and the ward clerk, be delivered by the ward clerk to the city clerk within 24 hours after the meeting (chapter 47, § 1); that, as soon as the declaration of votes is made, the moderator deliver the ballots to the ward clerk, who is required to seal up, direct, and deliver the same to the board of inspectors; that the inspectors be in session for that purpose, and preserve the ballots for a period of eight months (Laws 1878, c. 165, § 8); that the city councils meet in convention on the day appointed by law or ordinance; that the city clerk, having entered upon the record the number of votes given in each ward for every person voted for as mayor, lay before the convention the returns of the votes, and the convention examine the same, and declare elected the person who has the largest number of votes, and cause him to be notified of his election (Pub. St. c. 47, § 2). If there were no other provisions of law regulating the count and declaration of votes, it would be plain that the duties devolved upon the convention would be ministerial, neither calling for nor permitting any inquiry into the correctness of the votes as counted and declared in the several wards, and returned to the city clerk; and any party aggrieved by the counting would be left to his remedy by *quo warranto*. But provision is made by the statute for a contest in the election of mayor. "In case the election of mayor is contested, the city councils in convention shall have power to send for persons and papers, may inquire into the correctness of the returns, and shall hear and receive evidence as to any fraud or misconduct in relation to the election; and for that purpose may adjourn from time to time, not later than the time appointed for the convention of the new city councils." *Id.* c. 47, § 3.

Election of Mayor —Contests— Powers of City Council.

Whatever the powers thus conferred upon the city councils may be called, it is apparent that their duties are not confined

to the mere tabulation of the returns, and a declaration of the result as shown by such tabulation. Unless the legislature intended to authorize an investigation into the legality of the election and correctness of the records of the ward clerks, no reason appears for the enactment of the statute. The familiar rule in the construction of statutes requires such interpretation to be put upon it as will make it operative, and carry out the apparent legislative intent. The contest referred to in the statute means something more than an inquiry into the question whether the ward clerks have correctly recorded the result as declared by the moderators, or have returned to the city clerk correct copies of the record. Ample legislation for such purpose has existed for more than 50 years. Laws 1839, c. 452; Rev. St. c. 30, § 4; Pub. St. c. 39, § 3. If nothing more was intended, the provision for hearing and receiving evidence as to fraud or misconduct in the election is an idle one, to which no effect can be given. The city councils, as a joint body, are clothed with power, not only for inquiring into the correctness of the returns, but for passing upon any questions of "fraud or misconduct in relation to the election," and for such purpose may send for persons and papers. The office is an annual one, and a tribunal is created for the speedy settlement, in the first instance at least and before the term of office commences, of the right of the candidates claiming the office to enter upon and enjoy it. Whether such adjudication is final, or the right of the occupant seated by the city councils may be later inquired into on *quo warranto*, is a question that need not be settled in this proceeding.

The objection that the examination and counting of the ballots cannot be intrusted to a committee of the councils is not well taken. It is not a delegation of delegated authority, in the sense in which the well-known maxim is understood. The uniform practice of all legislative bodies to act through committees of their own members, and the universal understanding of the people that such duties may be discharged by a committee, are evidence

City Councils—Committees.

on the question of the legality of such proceeding. The proceeding is one for convenience merely, the convention reserving to itself the right of final action. Paine, Elect. § 797. We are of opinion that the city councils have the power to compel the production of the ballots in the hands of the inspectors, to examine them when produced, and to weigh the evidence disclosed by such examination, in determining the result of the election. The injunction is denied, and the bill dismissed. All concurred, except DOE, C. J., who concurred in the result.

NOTE.

City Councils—Power to Act through Committee.—A city council may delegate to a committee the duty of investigation, when it becomes necessary to ascertain facts. Bissel *v.* Jeffersonville, 24 How (U. S.) 287; Commonwealth *v.* Pittsburg, 14 Pa. St. 177; Main *v.* Ft. Smith, 49 Ark. 480; Preble *v.* Portland, 45 Me. 241.

Where a city council is the judge of the election of its mayor, other officers, or members, the council may appoint a committee to take testimony and to report it and the ascertained facts to the council for the purpose of enabling it to come to a decision. Salmon *v.* Hayes, 50 N. J. L. 97.

KNIGHT *et al.*

v.

TOWN OF WEST UNION *et al.*

(*Supreme Court of Appeals of West Virginia.*)

Ordinances—Repeal by Implication.* —A subsequent municipal ordinance, fully covering the subject-matter of a previous ordinance, being a substitute therefor, repeals the former by implication, without words to that effect.

Authority to Issue Municipal Bonds—Validity of Election.—In a municipality having less than 600 voters, an election confined solely to the question of the issue of municipal bonds is not invalid because conducted in the mode prescribed for the election of municipal officers in the absence of political or party nominations.

*See Goldsmith *v.* Mayor, etc., of City of Huntsville (Ala.), *ante* and *note*.

Knight *v.* Town of West Union

Elections—Informalities.—Mere informalities of the election officers in holding, and ascertaining and declaring the result of, an election, unless otherwise provided by statute, will not vitiate an election otherwise fair and impartial.

Bonds—Authority to Issue.—In an ordinance the authorization of bonds not to exceed $6,000 is equivalent, in legal effect, to fixing the amount of such bonds at such sum. In either case, the authorities would only have the right to issue bonds sufficient to cover the purpose for which the ordinance is adopted.

Authority of De Facto Officers.*—The acts of *de facto* municipal officers, within the scope of their authority and under color of law, are valid and binding, in the absence of clear proof that they are not the *de jure* officers of such municipality.

Municipal Taxation—Construction of Statute.—Section 31, c. 47, Code, authorizes towns and villages chartered under such chapter to levy taxes, not exceeding one dollar on every hundred dollars of property within such municipality.

(Syllabus by the Court.)

APPEAL by plaintiff from Doddridge county circuit court. *Affirmed.*

W. S. Stuart, for appellants.

Willis & Stuck and *J. V. Blair*, for appellees.

DENT, J. Injunction against the issue of waterworks bonds by the municipal authorities, which was dissolved on final hearing by the circuit court of Doddridge county. Plaintiffs appeal, and rely upon numerous alleged errors, as follows, to wit: Case Stated.

1. As the first assignment of error is merely general, and is admitted to be covered by the other assignments, it becomes unnecessary to discuss it specifically.

2. The second assignment is, in effect, that, at the time of the passage of the ordinance in controversy, there was already in existence an unrepealed ordinance, relating to the same subject-matter appearing in the minutes of the council. The adoption of a subsequent ordinance, covering fully and completely the subject-matter of a former ordinance, operates by implication to repeal the same. 23 Am. & Enc. Law, 485. Ordinances—Repeal by Implication.

*See notes at end of case.

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3. The third, fourth, and fifth assignments relate to the mode of holding the election. The appellants insist that it should have been held under the present, or what is known as the "Australian," ballot system; whereas, it was held in the mode and according to the laws in force prior to the adoption of such system in this state. It is conceded by appellants' counsel that the election was held as provided in section 85, c. 29, Acts 1895, for the election of municipal officers, in absence of party nominations in municipalities, containing less than 600 voters, and that the town of West Union was a municipality coming within the purview of such law. Section 4, c. 141, Acts 1872–73, provides: "Such elections shall be conducted in all things according to the laws then in force governing elections and the provisions of the charter of the city, town or village in which they are held." This means in so far, of course, as such provisions are applicable, and is to the effect that such election, when held in a municipality, shall be conducted in all things as elections for municipal officers are conducted; and hence, as it is in no wise a party question, and in a municipality containing less than 600 voters, it should be conducted as elections for municipal officers are conducted when there are no party nominations. The words, "in which an election is held for municipal officers," are used in opposition to elections held for national, state, and county officers, and were not intended to exclude elections held for other municipal purposes. In a simple bond election of this character, it is not reasonable to hold that the legislature intended it should be held under the intricate and nonapplicable provisions of the Australian ballot system. Nor was there any good reason why the council should postpone the ascertainment of the result until after the fifth day of the election, as no irregularities on its part, as to ascertaining, declaring, and recording the result, could possibly invalidate the same. Its duties in this respect are merely ministerial, and are subject to correction in the manner provided by law.

Authority to Issue Municipal Bonds—Validity of Election.

4. In the fifth assignment it is insisted that the ordinance is invalid, for the reason that the amount of bonds to be authorized, instead of being fixed at $6,000, is fixed at a sum not to exceed $6,000. One expression is equivalent to the other, and in either case it would be necessarily construed to mean that the council was authorized to issue bonds to the amount of $6,000, if necessary, for the purpose expressed in the ordinance; otherwise not. It is time enough for the council to make provision for the investment of the sinking fund when it accrues.

Bonds—Authority to Issue.

5. The sixth assignment of error is unsustained, because it clearly appears that the authorities had given sufficient notice, and were proceeding to sell said bonds at public sale, to the highest bidder in writing. The notice was to the public, and was sufficiently explicit to be in compliance with the statute.

6. The seventh assignment of error relates to the conduct of election officers. It is the settled law of this state that misconduct of election officers, which does not effect the result of the election, cannot invalidate such election. Dial *v.* Hollandsworth, 39 W. Va. 1, 19 S. E. 557.

Elections—Informalities.

7. The eighth assignment attacks the official integrity of the mayor and council of the town. They are admitted to be *de facto* officers, with the title to their offices unimpeached, except in this collateral proceeding, and, unless the contrary plainly appears, they will be presumed to be *de jure* officers, and all their official acts be respected and upheld. Mere vague charges as to their failure to qualify will not render their official acts void.

Authority of De Facto Officers.

8. The ninth assignment relates to the title of the ordinance, "An ordinance for the issue of waterworks," which the appellants insist is insufficient to give notice of the subject-matter thereof. This is clearly shown to have been a mere clerical omission in the recordation of the ordinance. It is, however, selfcorrective, as it easily suggests the words nec-

essary to make complete sense. No person was misled thereby, as it appears from the bill to have been properly corrected in the published copy thereof.

9. The tenth assignment is: "Because the regular annual levy of the said town for running the same was already 60 cents on the hundred dollars, and the said 25 cents additional direct annual levy is unlawful, and exceeds the limit fixed by said section 1 of chapter 141 of said Acts of 1872–73." A sufficient answer to this is that section 31, c. 47, Code,—being the chapter under which the town of West Union exists,—authorizes a levy of not exceeding one dollar on every hundred dollars of property, and which, at least, must be regarded as amendatory of section 1, c. 141, Acts 1872—73, being a subsequent enactment.

Municipal Taxation—Construction of Statute.

10. The eleventh assignment of error, relating to the term of court at which the injunction was dissolved and bill dismissed, has been cured by the production of the necessary orders showing the appointing and holding of a special term of court in accordance with law, at which this cause was heard and determined.

A careful scrutiny of the record reveals no good reason why the legally expressed will of the voters of the town of West Union should not be carried out by the authorities thereof, within the limitation of the constitution and laws of this state, and therefore the decree complained of is affirmed.

NOTES.

De Facto Public Officers—Validity of Acts.—The general rule is that the acts of a *de facto* public officer within the powers and duties of the office are valid so far as they concern the public or third persons who have an interest in the things done, and that such acts cannot be collaterally attacked.

England.—Rex *v.* Slythe, 6 B. & C. 240, 13 E. C. L. 155, 9 D. & R. 226; Milward *v.* Thatcher, 2 T. R. 87.

Canada.—Crookshank *v.* Macfarlane, 7 New Bruns. 544; Pontiac *v.* Ross, 17 Can. Sup. Ct. Rep. 406; O'Neil *v.* Atty.-Gen., 26 Can. Sup. Ct. Rep. 122.

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United States.—Hussey *v.* Smith, 99 U. S. 20; Northwestern Mut. L. Ins. Co. *v.* Seaman, 80 Fed. Rep. 357; Gonzales *v.* Ross, 120 U. S. 605; McDowell *v.* U. S., 159 U. S. 596; Nofire *v.* U. S., 164 U. S. 657.

Alabama.—Cook *v.* State, 91 Ala. 53; Lockhart *v.* Troy, 48 Ala. 579; Lee *v.* State, 49 Ala. 43; Thrower *v.* State, 52 Ala. 22; Thorington *v.* Gould, 59 Ala. 461; Masterson *v.* Matthews, 60 Ala. 260; Joseph *v.* Cawthorn, 74 Ala. 411; Walker *v.* State, 107 Ala. 5.

Arizona.—Jeffords *v.* Hine (Arizona 1886) 11 Pac. Rep. 351.

Arkansas.—Miller *v.* Callaway, 32 Ark. 666; Carter *v.* State, 43 Ark. 132; Murphy *v.* Shepard, 52 Ark. 356; Barton *v.* Lattourette, 55 Ark. 81.

California.—Satterlee *v.* San Francisco, 23 Cal. 314; People *v.* Sassovich, 29 Cal. 480; Woodward *v.* Fruitvale Sanitary Dist., 99 Cal. 554; Buck *v.* Eureka, 109 Cal. 504.

Colorado.—Darrow *v.* People, 8 Colo. 417; Morris *v.* People, 5 Colo. App. 138.

Connecticut.—Smith *v.* State, 19 Conn. 493; Trinity College *v.* Hartford, 32 Conn. 452.

Florida.—Kissimmee City *v.* Cannon, 26 Fla. 3.

Georgia.—Crawford *v.* Howard, 9 Ga. 314; Pool *v.* Perdue, 44 Ga. 454; Waller *v.* Perkins, 52 Ga. 233; Gunn *v.* Tackett, 67 Ga. 725; Smith *v.* Meador, 74 Ga. 416.

Illinois.—Barlow *v.* Standford, 82 Ill. 298; Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61; Samuels *v.* Drainage Com'rs, 125 Ill. 536; People *v.* Ammons, 10 Ill. 105; People *v.* Bangs, 24 Ill. 184; Sullivan *v.* State, 66 Ill. 75; Trumbo *v.* People, 75 Ill. 561; People *v.* Beach, 77 Ill. 52; People *v.* Weber, 86 Ill. 283; Leach *v.* People, 122 Ill. 420; School Directors *v.* National School Furnishing Co., 53 Ill. App. 254.

Indiana.—Milford School Town *v.* Zeigler, 1 Ind. App. 138; Parker *v.* State, 133 Ind. 178; Creighton *v.* Piper, 14 Ind. 182; Mowbray *v.* State, 88 Ind. 324; Steinback *v.* State, 38 Ind. 489; Case *v.* State, 69 Ind. 46; Baker *v.* Wambaugh, 99 Ind. 312; Davidson *v.* State, 135 Ind. 254.

Iowa.—State *v.* Powell (Iowa 1897) 70 N. W. Rep. 592; Gourley *v.* Hankins, 2 Iowa 75; Peirce *v.* Weare, 41 Iowa 378; Burke *v.* Cutler, 78 Iowa 299.

Kansas.—Gilleland *v.* Schuyler, 9 Kan. 569; Riley *v.* Garfield Tp., (Kan. 1897) 49 Pac. Rep. 85; Hale *v.* Bischoff, 53 Kan. 301; Morton *v.* Lee, 28 Kan. 286.

Kentucky.—Rice *v.* Com., 3 Bush (Ky.) 14; Taylor *v.* Com., 3 J. J. Marsh (Ky.) 401; Stokes *v.* Kirkpatrick, 1 Metc. (Ky.) 143; Patterson *v.* Miller, 2 Metc. (Ky.), 493; Hoglan *v.* Carpenter, 4 Bush (Ky.) 89; Justices *v.* Clark, 1 T. B. Mon. (Ky.) 82.

Louisiana.—Citizens Bank *v.* Bry, 3 La. Ann. 630.

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Maine.—Hutchings *v.* Van Bokkelen, 34 Me. 126; Hooper *v.* Goodwin, 48 Me. 79; Cushing *v.* Frankfort, 57 Me. 541; Pooler *v.* Reed, 73 Me. 129; Belfast *v.* Morrill, 65 Me. 580; Abbott *v.* Chase, 75 Me. 83; Johnson *v.* McGinly, 76 Me. 432; Whiting *v.* Ellsworth, 85 Me. 301.

Maryland.—Koontz *v.* Hancock, 64 Md. 134.

Massachusetts.—Coolidge *v.* Brigham, 1 Allen (Mass.) 333; Sudbury *v.* Heard, 103 Mass. 543; Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374; Atty.-Gen. *v.* Crocker, 138 Mass. 214.

Michigan.—People *v.* Gobles, 67 Mich. 475; Zabel *v.* Harshman, 68 Mich. 273; Wayne County *v.* Benoit, 20 Mich. 176; Donough *v.* Dewey, 82 Mich. 309; Carlisle *v.* Saginaw, 84 Mich. 134; Auditor Gen. *v.* Menominee County, 89 Mich. 552.

Minnesota.—Parker *v.* Dakota County, 4 Minn. 59; McCormick *v.* Fitch, 14 Minn. 252; Ramsey County *v.* Brisbin, 17 Minn. 451; Carli *v.* Rhener, 27 Minn. 292; State *v.* McMartin, 42 Minn. 30.

Mississippi.—Rhodes *v.* McDonald, 24 Miss. 418; Kimball *v.* Alcorn, 45 Miss. 151; Vicksburg *v.* Lombard, 51 Miss. 111; Christian *v.* Gibbs, 53 Miss. 314; Alabama, etc., R. Co. *v.* Bolding, 69 Miss. 255, 30 Am. St. Rep. 541.

Missouri.—Conway *v.* St. Louis, 9 Mo. App. 488; State *v.* Dierberger, 90 Mo. 369; State *v.* Miller, 111 Mo. 542; Perkins *v.* Fielding, 119 Mo. 149.

Montana.—State *v.* Cook, 17 Mont. 529.

Nebraska.—Magneau *v.* Fremont, 30 Neb. 843, 27 Am. St. Rep. 436.

Nevada.—Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484; Sawyer *v.* Dooley, 21 Nev. 390.

New Hampshire.—Atty.-Gen. *v.* Marston, 66 N. H. 485; Londonderry *v.* Chester, 2 N. H. 268, 9 Am. Dec. 61; Lisbon *v.* Bow, 10 N. H. 167; Jones *v.* French, 18 N. H. 190; Merrill *v.* Palmer, 13 N. H. 184; State *v.* Winkley, 14 N. H. 480; Jewell *v.* Gilbert, 64 N. H. 13, 10 Am. St. Rep. 357.

New Jersey.—Erwin *v.* Jersey City, 60 N. J. L. 141; Harvey *v.* Philbrick, 49 N. J. L. 374; State *v.* Anderson, 1 N. J. L. 366, 1 Am. Dec. 207; Hoagland *v.* Culvert, 20 N. J. L. 387; State *v.* Meyers, 29 N. J. L. 392; State *v.* Tolan, 33 N. J. L. 195.

New York.—Devlin's Case, 5 Abb. Pr. (N. Y. C. Pl.) 281; Conover's Case, 5 Abb. Pr. (N. Y. Supreme Ct.) 73; Bentley *v.* Phelps, 27 Barb. (N. Y.) 524; People *v.* Tieman, 30 Barb. (N. Y.) 193. 8 Abb. Pr. (N. Y.) 359; Colton *v.* Beardsley, 38 Barb. (N. Y.) 29; Morris *v.* People, 3 Den. (N. Y.) 381; People *v.* Covert, 1 Hill (N. Y.) 674; People *v.* Anthony, 6 Hun (N. Y.) 142; Burditt *v.* Barry, 6 Hun (N. Y.) 657; People *v.* Orleans County Court, 28 Hun (N. Y.) 14; Morrison *v.* Sayre, 40 Hun (N. Y.) 465; People *v.* McDowell, 70 Hun (N. Y.) 1; People *v.* Collins, 7 Johns. (N. Y.) 549; M'Instry *v.* Tanner, 9 Johns. (N. Y.) 135; Hamlin *v.* Dingman, 5 Lans. (N. Y.) 61; Bar-

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rett *v.* Sayer, (Supreme Ct.) 34 N. Y. St. Rep. 325, 58 Hun (N. Y.) 608; Dolan *v.* New York, 68 N. Y. 274; Lambert *v.* People, 76 N. Y. 220, 32 Am. Rep. 293; Olmstead *v.* Dennis, 77 N. Y. 378; Wilcox *v.* Smith, 5 Wend. (N. Y.) 231; People *v.* White, 24 Wend. (N. Y.) 520.

North Carolina.—Burke *v.* Elliott, 4 Ired. L. (26 N. Car.) 355; Burton *v.* Patton, 2 Jones L. (47 N. Car.) 124, 62 Am. Dec. 194; State *v.* Turner, 119 N. Car. 841; Hughes *v.* Long, 119 N. Car. 52; Threadgill *v.* Carolina Cent. R. Co., 73 N. Car. 178; State *v.* Speaks, 95 N. Car. 689.

Ohio.—State *v.* Constable, 7 Ohio, pt. i. 7; Scovill *v.* Cleveland, 1 Ohio St. 126; Molitor *v.* State, 6 Ohio Cir. Ct. Rep. 263; Kirker *v.* Cincinnati, 48 Ohio St. 507.

Oregon.—Territory *v.* Pyle, 1 Oregon 149; Hamlin *v.* Kassafer, 15 Oregon 456, 3 Am. St. Rep. 176.

Pennsylvania.—Riddle *v.* Bedford County, 7 S. & R. (Pa.) 386; Thompson *v.* Ewing, 1 Brews. (Pa.) 67; Com. *v.* Waller, (Pa. C. Pl.) 28 W. N. C. (Pa.) 252, 8 Lanc. L. Rev. 276, 48 Leg. Int. (Pa.) 312, 10 Pa. Co. Ct. Rep. 111.

South Carolina.—McBee *v.* Hoke, 2 Spears L. (S. Car.) 138; State *v.* Hill, 2 Spears L. (S. Car.) 150; *Ex. p.* Norris, 8 S. Car. 408; Cromer *v.* Boinest, 27 S. Car. 436.

South Dakota.—Merchants' Nat. Bank *v.* McKinney, 2 S. Dak. 106; Fylpaa *v.* Brown County, 6 S. Dak. 634.

Tennessee.—Bates *v.* Dyer, 9 Humph. (Tenn.) 162; Galbraith *v.* McFarland, 3 Coldw. (Tenn.) 267, 91 Am. Dec. 281; Ward *v.* State, 2 Coldw. (Tenn.) 605; Kelly *v.* Story, 6 Heisk. (Tenn.) 202; Maley *v.* Tipon, 2 Head (Tenn.) 403; Pearce *v.* Hawkins, 2 Swan (Tenn.) 87.

Texas.—Aulanier *v.* Governer, 1 Tex. 653.

Utah.—See Utah Comp. Laws (1888), § 4394.

Vermont.—Spaulding *v.* Vincent, 24 Vt. 501; Lyndon *v.* Miller, 36 Vt. 329; State *v.* Bates, 36 Vt. 387; Power's Estate, 65 Vt. 399; Brush *v.* Cook, Brayt. (Vt.) 89.

Virginia.—Maddox *v.* Ewell, 2 Va. Cas. 59; McCraw *v.* Williams, 33 Gratt. (Va.) 510; Roche *v.* Jones, 87 Va. 484.

Washington.—State *v.* Fountain, 14 Wash. 236.

Wisconsin.—Chicago, etc., R. Co. *v.* Lanklade County, 56 Wis. 614; Yorty *v.* Paine, 62 Wis. 154.

Same—Same—Elections.—An election called or conducted by *de facto* officers is valid. Butler *v.* Walker, 98 Ala. 358, 39 Am. St. Rep. 61; State *v.* County Canvassers, 17 Fla. 9; Com. *v.* Sullivan, 165 Mass. 183; Quinn *v.* Markoe, 37 Minn. 439; Wells *v.* Taylor, 5 Mont. 202; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; Wilson *v.* Peterson, 69 N. Car. 113; State *v.* Hoff (Tex. Civ. App. 1895), 29 S. W. Rep. 672; State *v.* Goowin, 69 Tex. 55.

CALIFORNIA IMP. CO.

v.

REYNOLDS *et al.*

(*Superior Court of California, Dec. 20, 1898.*)

Street Improvement—Action on Assessment—Pleading.—The street improvement act declares that the resolution of intention to order an improvement shall be posted conspicuously for two days on or near the chamber door of the council; and the complaint in an action on a street assessment merely alleged that the resolution was posted in the manner prescribed by law; but the objection that the complaint did not aver that the resolution was posted "conspicuously" was not raised by special demurrer. *Held*, that, "after verdict," the averment must be adjudged sufficient.

Same—Resolution of City Council—Publication.—Defendants sufficiently complied with the statutory requirements in regard to the posting and publication of such resolution.

Pleading.—It was not necessary to set out the specifications for work in the complaint in an action by an improvement company on a street assessment.

Regularity of Proceedings—Evidence.—Where the assessment, diagram, and warrant, with the engineer's certificate, are introduced in evidence, and there is no evidence that the resolution of intention was not posted as required by law, it must be held that it was so posted.

Discouraging Competition—Validity of Contract.*—A contract for street improvements which fixes the amount which the contractor shall receive, but leaves the cost of the work subject to the will of the street superintendent, is invalid, and an assessment for the improvements so contracted for will not create a lien upon the adjacent land.

APPEAL by defendants from Alameda county superior court. *Reversed.*

C. Harding Tebbs, for appellants.

John T. Thornton (*James D. Thornton*, of counsel), for respondent.

*See note at end of case.

California Imp. Co. *v.* Reynolds

HARRISON, J. Action upon a street assessment. The defendants filed a general demurrer to the complaint, which was overruled, and the cause was thereafter tried and judgment rendered in favor of the plaintiff, from which the defendants have appealed.

Case Stated.

1. Section 3 of the street improvement act (St. 1891, p. 196) declares that, after the passage of the resolution of intention to order the improvement, the resolution "shall be posted conspicuously for two days on or near the chamber door of the council." The complaint herein alleges that the council "directed its clerk to publish and post said resolution of intention for two days in the manner prescribed by law," and that "said resolution was published and posted for two days in the form and manner above described." It is objected that the complaint is defective in not averring that the resolution was posted "conspicuously." This objection was not raised by special demurrer, and, as the averment was sufficient to authorize evidence of the character of the posting, if controverted, it must be held, "after verdict," that the averment was sufficient.

Street Improvement—Action on Assessment—Pleading.

2. The resolution was passed September 7, 1891, and was published and posted by the clerk for two days, the publication being on the 10th and 11th of September, and the posting is alleged to have been made "on the 10th to the 12th of September." The superintendent of streets caused a notice of the work sufficient in form to be posted and kept posted for six days along the line of said work, and also caused a similar notice to be published for six days, "which publication commenced on the 11th day of September, A. D. 1891, and ended on the 17th day of September, 1891, and was made meanwhile as often as said newspaper was issued." Section 3 of the above statute, after providing for the posting and publishing of the resolution of intention, declares that "the street superintendent shall thereupon cause to be conspicuously posted along the line of said contemplated work or improvement notices of the

Same—Resolution of City Council—Publication.

passage of said resolution. He shall also cause a notice similar in substance to be published for six days in one or more daily newspapers published and circulated in said city," etc. In Paving Co. *v.* Anker, 104 Cal. 340, 37 Pac. 1050, it was held that the publication and posting of the resolution by the clerk for the time named in this section is a condition precedent to the authority of the superintendent to post and publish the notices thus required, and it is contended by the appellants that, as the publication was commenced on the 11th of September, it was premature, and insufficient to give the notice required by the statute. But, admitting this to be so, the publication was continuous, and may be regarded as commencing on the 12th of September; and, as the complaint alleges that it ended on the 17th and was meanwhile published as often as said newspaper was issued, it shows a sufficient compliance with the statute. The fact subsequently shown that it was not published on the 13th, that day being a Sunday, and the newspaper not being issued on that day, does not impair its sufficiency. Section 34 of the statute requires the publication of the notice in a daily newspaper only "as often as the same is issued," and the requirement in section 3 that the notice shall be published for six days does not require a publication upon six separate days. Taylor *v.* Palmer, 31 Cal. 240.

3. It was not necessary to set out the specifications for the work in the complaint at length, any more than to set out the contract *in extenso*. The specifications are but a part of the contract, and the averment that the plaintiff entered into a contract with the superintendent of streets for doing the work according to the specifications therein sufficiently alleged that step in the proceedings to show its right to receive an assessment upon the due performance of the contract. See Byrne *v.* Luning Co. (Cal.) 38 Pac. 454. The averment in the complaint "that the plaintiff did all the work in said contract mentioned, and duly performed on its part in every respect said work according to the specifications and the terms of the contract,"

Pleading.

sufficiently avers its performance. This is not a statutory averment of the performance of conditions precedent referred to in section 457, Code Civ. Proc., as is suggested by counsel for appellants.

4. It is next urged that the evidence is insufficient to show that the resolution of intention was posted for two days, and in support of this contention appellants rely upon the fact that the affidavit of such posting was made out of the jurisdiction of this state, and was therefore unauthorized. There was no evidence, however, that the resolution was not posted for two days, and, if the affidavit be disregarded, the assessment, diagram, and warrant, with the engineer's certificate, were introduced in evidence, and by section 12 of the statute they are made *prima facie* evidence of the regularity and correctness of the prior proceedings.

Regularity of Proceedings—Evidence.

5. The specifications for doing the work provided that "the rock to be used on the surface of the roadway shall be of such size as to pass through a one-inch mesh, a smaller percentage of fine material consequent upon the crushing of the rock being allowable, the amount of the same to be governed by the superintendent of streets." Under this specification the superintendent was at liberty after the contract had been entered into to determine or vary the amount of fine material to be used, and it was therefore impossible for bidders to determine in advance the cost for doing the work, and competition in bidding was therefore restrained, and after the contract had been awarded the owners were unable to determine whether it would be to their advantage to elect to take the contract. The fact that the contract was awarded at a fixed sum per square foot fixes the amount which the contractor would receive, but the profit or cost of the work would depend upon the will of the superintendent. The vice of the contract is the same in character as existed in Bolton *v.* Gilleran, 105 Cal. 244, 38 Pac. 881, and under the principles declared in that case the contract must be held invalid.

Discouraging Competition—Validity of Contract.

The validity of the contract is to be determined by its terms, irrespective of the amount involved. Unless there is a valid contract for the work, the assessment therefor will not create a lien upon the adjacent land. The judgment and order are reversed.

We concur: GAROUTTE, J.: VAN FLEET, J.

NOTE.

Contracts for Improvements—Discouraging Competition.—Where a contract for municipal improvements is required by law to be made in accordance with advertised specifications, and it specifies the quality of the material to be furnished but not the quantity, it is void, as the insufficiency of the specifications will prevent competitive bidding. Bigler *v.* Mayor, etc., of New York, 5 Abb. (N. Y.), N. Cas. 51.

BELFAST WATER CO.

v.

CITY OF BELFAST.

(*Supreme Judicial Court of Maine, Aug. 12, 1898.*)

Contract between City and Water Company—Construction of.—The plaintiff made a contract with the defendant in which it was agreed, among other things, that the company should furnish, at such points as the city should thereafter designate, which points should be substantially those indicated upon the plan annexed to the contract, 45 hydrants, of approved pattern, each provided with three nozzles, wherever required by the city. It was further agreed that if, at any time, the city desired additional hydrants above said number of 45, the company should furnish the same at an annual rental of $35 for each hydrant set upon the pipe indicated upon the plan, and $40 for each hydrant which should come on new pipe; also, that if the city should desire 5 hydrants additional to the 45 before stipulated, located so as to require no more pipe than should be necessary to connect up the said 45 hydrants, the company should place said 5 hydrants without additional charge, provided they could be set during the construction of the works, and include the rent thereof in the sum thereinafter designated for hydrant service. It was also agreed that all hydrants should be "so piped as to receive an abundant and sufficient circulation of water among and in all of the same." The company further

Belfast Water Co. *v.* City of Belfast

agreed "to lay a main pipe, not less than ten inches and not more than twelve in diameter in the clear, from the reservoir or standpipe," through certain specified streets, "to connect up all said forty-five hydrants, located as aforesaid, and all such additional hydrants, in such manner that none of said hydrants shall come on pipe smaller than six inches in diameter in the clear." The city agreed "to pay semiannually for the hydrants aforesaid, not exceeding fifty in number, a rent of nine hundred dollars."

After the original waterworks had been completed, the city directed the company to lay a main through a street, not specifically named in the contract, "as provided in the contract with said company." The company laid a four-inch main, set 2 hydrants, and connected the hydrants and main with six-inch pipe. In an action to recover the hydrant rental under the contract, the court holds that all hydrants in addition to the original 45, whether placed during the construction of the works or later, are within the provision of the contract requiring the location of "all such additional hydrants in such manner that none of said hydrants shall come on pipe smaller than six inches in diameter," and that, even if the facts of the case otherwise admitted of the application of the doctrine of "substantial compliance," it cannot be said that furnishing pipe less than half the capacity called for by the contract is a substantial compliance with its provisions. *Held*, that the plaintiff cannot recover the rental.

Same—Subsequent Change in Street—Removal of Water Boxes—Expenses—Liability of City.*—By virtue of a contract with the city, the company obtained authority "to dig up any and all highways, ways, and streets in said city for the purpose of laying pipes during the time of constructing said works"; and, acting under this authority, it laid its pipes and located certain water gates within the street limits, near the edge of the sidewalk as it then existed. Subsequently the city proposed to widen the sidewalk and put down a granite curbing, and directed the company to move the gate boxes and place them outside of the curbing, which was accordingly done. *Held* that, when the company placed its water gates in the street under this contract, it did so subject to the right of the city to make such changes in the surface of the street and the alignment of the sidewalk as might be necessary to render the street safe and convenient for public travel, and whenever it became necessary to change the location of the water boxes, by reason of necessary repairs or improvements in the street, it was the duty of the company to make the change at its own expense. *Held*, that it cannot recover the expense of the city.

(Official.)

*See note at end of case.

Belfast Water Co. *v.* City of Belfast

REPORT from Waldo county supreme judicial court. *Judgment for defendant.*

ARGUED before PETERS, C. J., and HASKELL, WHITEHOUSE, WISWELL, and SAVAGE, JJ.

R. F. Dunton, for plaintiff.

George E. Johnson, for defendant.

Case Stated.

SAVAGE, J. The principal item which the plaintiff seeks to recover in this suit is the rental of two hydrants from October 1, 1893, to October 1, 1897. It appears that the defendant city directed the plaintiff company "to lay a main through Vine street to Waldo avenue, as provided in the contract with said company." A main was laid, and the hydrants placed. And these are the hydrants in question. The main was of four-inch pipe. The connection from the main to the hydrants was of six-inch pipe.

The defendant claims that the plaintiff was obliged by its contract to lay its mains with which hydrants were to be connected at least six inches in diameter, and that having failed to do so in this instance, and having put in only four-inch pipe, it cannot recover the hydrant rental.

The rights of the parties are fixed by a contract in writing dated November 15, 1886, which is made a part of the case. The only parts of the contract which relate to the subject-matter of this controversy are these:

"And said party of the first part (the company) hereby further agrees to furnish at such points as said party of the second part (the city) may hereafter designate, which points shall be substantially those indicated upon the plan hereunto annexed, forty-five (45) hydrants of approved pattern, each provided with three nozzles, wherever required by said party of the second part. If at any time said party of the second part desires additional hydrants above said number of forty-five (45), said party of the first part agrees to furnish the same at an annual rental of thirty-five dollars ($35) for each hydrant set upon the pipe indicated upon the plan aforesaid,

and forty dollars ($40) for each hydrant which shall come on new pipe: provided, however, that said party of the second part shall pay at the rate of rent of one hydrant for every seven hundred (700) feet of extended pipe. And if said party of the second part should desire five (5) hydrants additional to the forty-five before stipulated, located so as to require no more pipe than shall be necessary to connect up said forty-five hydrants, said party of the first part agrees to place said five hydrants without additional charge, provided they can be set during the construction of said works, and to include the rent thereof in the sum hereinafter designated for hydrant service. All hydrants are to be so piped as to receive an abundant and sufficient circulation of water among and in all of the same."

"And said party of the first part further agrees to lay a main pipe not less than ten (10) inches, and not more than twelve (12) inches, in diameter, in the clear, from said reservoir or standpipe, down Main street to the junction of Main and High streets, and there divide the same into three (3) eight (8) inch branches, one continuing down Main street, and one each way on High street, and to furnish sufficient six (6) inch pipe, to connect up all said forty-five hydrants, located as aforesaid, and all such additional hydrants, in such manner that none of said hydrants shall come on pipe smaller than six (6) inches in diameter in the clear."

And the city, on its part, agreed "to pay semiannually for the hydrants aforesaid, not exceeding fifty in number, a rent of nine hundred dollars."

By this contract the company agreed, in the first place, to place 45 hydrants for a semiannual rental of $900. Then it agreed to place additional hydrants, without limit, as desired by the city, for a specified rental. But it was provided that the company should place 5 hydrants additional to the 45 without extra charge,—that it is to say, for the same $900,—if they could be set during the construction of the works, and

should require no more pipe than was necessary to connect up "the forty-five hydrants."

The defendant relies upon the following clause in the contract: "* * * and all such additional hydrants" shall be located "in such manner that none of such hydrants shall come on pipe smaller than six inches in diameter in the clear." The plaintiff claims that this clause is limited to the five "additional hydrants" which might be placed without extra charge during the construction of the works, under the *proviso* to which we have referred, and not to "additional hydrants" which might be placed thereafter by direction of the city. The plaintiff contends further that, as to additional hydrants placed after the completion of the works, the only requisite specified in the contract is that "all hydrants are to be so piped as to receive an abundant and sufficient circulation of water among and in all of the same." We do not think so. It is true that the clause just quoted is general, and applies to all hydrants,—both the original 45, and all additional ones, whenever placed. But we think that, in addition to this, all additional hydrants, whenever placed, must be so located as to come on pipe at least six inches in diameter. The contract reads, "all such additional hydrants." The words are general and inclusive. There is neither limitation nor distinction. We think that the necessary construction is that all additional hydrants, whether placed during the construction of the works or later, are within the requirement of the contract relating to size of pipes.

Contract between City and Water Company—Construction of.

But the plaintiff says that, even if such be the proper construction of the contract, it has in good faith substantially complied with the requirement in question. We do not think that the facts in this case admit of the application of the doctrine of "substantial compliance." Hill *v.* School Dist., 17 Me. 316; Mill Co. *v.* Westervelt, 67 Me. 446. And, if they did, we cannot say that furnishing pipe less than half the capacity called for by the contract is a substantial compliance with its provisions. The plaintiff cannot recover this item.

The plaintiff also sues for expense of changing water gates by order of committee on highways. The contract between the parties provides that the water company "shall have the privilege and right to supply water for domestic and other purposes, and be authorized to dig up any and all highways, ways and streets in said city, for the purpose of laying pipes during the time of constructing said works, and at any time thereafter, for the purpose of making extensions and repairs, and for doing such other work as may be necessary in connection therewith, or in the operation of said water works; the same to be done with as little obstruction or delay to public travel as may be practicable."

The water company at the time it built its works located the gates in question, which control private service, within the street limits, near the edge of the sidewalk as it then existed. Subsequently, in 1897, the city proposed to widen the sidewalk and put down a granite curbing. The city authorities notified the water company to move the gate boxes and place them outside of the curbing, which was accordingly done. No question is raised but that it was reasonable that the gate boxes should be so moved. There was no express agreement on the part of the city to pay the expenses of removal, but it is claimed that a promise may be implied from the circumstances already stated. We think not. When the company placed its gates in the street of the city under the contract referred to, it did so subject to the right of the city to make such changes in the surface of the street and the alignment of the sidewalk as might be necessary to render the street safe and convenient for public travel. In making needed repairs and changes in the streets, the city is but an instrument of the state, an agent of the public, and it cannot barter away its rights or fetter its duty to make such repairs and changes. To subject itself to the expense of changing the appliances of the water company in the streets whenever it became necessary to change them, by reason of repairs, would be a serious impairment of its rights, and an onerous addition to its duties.

Note

As well stated in National Waterworks Co. *v.* City of Kansas, 28 Fed. 921: "The contract between the plaintiff and the defendant must be interpreted in the light of this well-established rule; and, so interpreted, the plaintiff took its right to lay its pipes in the streets of the city subject to the paramount and inalienable right of the city to construct sewers therein whenever and wherever, in its judgment, the public interest demanded. Laying its pipes subject to this right of the city, it has no cause of action, if, in consequence of the exercise of this right, it is compelled to relay its pipes." See Rockland Water Co. *v.* City of Rockland, 83 Me. 267, 22 Atl. 166. Whenever it became necessary to remove the gates, it was the duty of the company to do so at its own expense.

Same—Subsequent Change in Street—Removal of Water Boxes—Expense—Liability of City.

Judgment for the defendant.

NOTE.

Water Companies' Use of Streets Subject to Right to Repair Streets.—When a water company lays its pipes in the streets under a contract with the municipality, it does so subject to the power of the latter to construct sewers and repair the streets, whenever and wherever it may be to the interest of the public to do so, and if the exercise of this power compels the company to relay its pipes, in the absence of unreasonableness or malice on the part of the municipality in exercising such power, the company cannot maintain a claim therefor, against the city. National Water Works Co. *v.* Kansas City, 28 Fed. Rep. 921. Here, it was further held that an allegation that the sewer might have occupied other space in the street, is not equivalent to an allegation that the city acted unreasonably or maliciously.

In Rockland Water Co. *v.* Rockland, 83 Me. 267, where the water company had a right under its charter to lay its pipes through the streets of the city "in such manner as not to obstruct or impede travel thereon," it was held that the city retained the right to repair its streets in the ordinary manner, although in so doing the pipes of the company might thereby become exposed and the company compelled to sink them deeper to protect them from frost and other dangers; it not appearing that the repairs of its streets by the munici-

pality were made in an improper or unusual manner. See also Montgomery *v.* Capital City Water Co., 92 Ala. 361; New Haven *v.* New Haven Water Co., 44 Conn. 105; Jersey City *v.* Hudson, 13 N. J. Eq. 420. In Jersey City *v.* Hudson, 13 N. J. Eq. 420, it was held that a water company could be compelled to lower its underground pipes, the location of which had been duly authorized by statute, so as to conform to a new grade established by the municipality.

L'HOTE

v.

CITY OF NEW ORLEANS *et al.*

(*Supreme Court of Louisiana, Nov. 21, 1898.*)

Regulating Houses of Prostitution—Validity of Ordinance—Constitutional Law.*—The city of New Orleans has the power to assign the limits beyond which houses of prostitution shall not be permitted. An ordinance of that character merely asserts the municipal functions to secure public order, decency, and morals, and violates none of the guaranties of the rights of person and property contained in the federal and state constitutions. City Charter, Act No. 45 of 1896, § 15; the similar provision in previous charters; Black, Const. Law, p. 301; 1 Dill. Mun. Corp. § 310.

(Syllabus by the Court.)

APPEAL by defendants *et al.* from parish of Orleans civil district court. *Modified.*

James J. McLoughlin, Asst. City Atty., and *Samuel L. Gilmore*, City Atty., for appellants.

E. Howard McCaleb, *E. Howard McCaleb, Jr.*, and *Rene C. Metoyer*, for appellee and intervener.

MILLER, J. The defendants appeal from the judgment maintaining the injunction restraining the enforcement of the ordinance of the common council changing the limits beyond which lewd women are prohibited from residing. From an

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See generally 1 Dill. Mun. Corp. § 376 (310), 9 Am. & Eng. Enc. Law (2nd Ed.) 511.

early period it has been the policy of the councils of the city to assign limits for houses of prostitution, by prohibiting, under prescribed penalties, the location of such houses beyond the designated limits. The ordinance earliest in date on this subject to which our attention has been directed was passed in 1857. There were changes in the limits in subsequent years, and the last ordinance which gave rise to the present controversy prescribed the south side of Custom House street, to the North side of St. Louis, and from Basin to the lower side of Robertson street, as the limits beyond which houses of prostitution were prohibited. This, as we understand it, extended the permitted limits of previous ordinances so as to include St. Louis street, from which such houses had been excluded by the ordinance passed shortly preceding that the city is now seeking to enforce. This last ordinance restricts the limit assigned to these houses by the previous ordidances by substituting "between Basin and Robertson streets" for the more enlarged space comprised between the river in front and the rear of the city, designated by earlier ordinances, although St. Louis street is embraced in the last ordinance, not in the ordinance immediately preceding the last enactment. It is claimed that St. Louis street never was within the space assigned for these houses. We derive a different impression, but whether or not included in the earlier ordinances can exert no appreciable influence on our decision.

The plaintiff, a property owner, and a resident on Treme street, intersecting St. Louis street, and half a square from St. Louis street, alleges, in his petition for the injunction, the close proximity of his dwelling to that portion of St. Louis street brought within the area in which houses of prostitution are to be allowed by the ordinance he proposes to enjoin; that his locality has been, and is, free from such houses; that their introduction is calculated to render his property unfit for his family dwelling, and greatly depreciates its value; that the ordinance excludes a large portion of the area in which houses of prostitution were previously permit-

ted, at the same time enlarging the limits so as to embrace St. Louis street; that the city, by the previous ordinances designating the limits and excluding St. Louis street, had exhausted the legislative power in respect to the subject; and the petition charges that the ordinance is oppressive, unjust, and violative of the protection to persons and property accorded by the constitution of the United States and of the state. There is an intervention by a religious corporation, owning and maintaining a church near to St. Louis street, between Robertson streets; and another intervention, by another property owner in the same neighborhood. The allegations in the petitions of intervention present the subject in a different phase, and allege the injury to property within the designated area, arising from confining houses of prostitution as proposed by the ordinance. Thus, the theory of the plaintiff's petition is that the city has no power to change the limits of houses of prostitution; the position of the interveners is, there should be no limits for such houses. The city and the officials sought to be restrained by the injunction. except to the jurisdiction of the civil district court, on the ground that the injunction sought is directed against the enforcement of a penal statute, that the petition discloses no cause of action, and on other grounds unnecessary to notice. The judgment maintained the injunction, and this appeal followed.

It is clear that the civil district court has no jurisdiction to restrain prosecutions for crime confined by the law to the criminal courts. No prevention of such prosecutions is attempted. The plaintiff seeks the injunction for the protection of his rights of property, menaced, as he conceives, by an illegal ordinance. The right of the citizen to that protection is too clear to permit dispute, and, in our view, the petition contains all that is essential to secure relief at our hands, if the allegations in the petition are supported. 1 High. Inj.§ 68. The regulation of houses of prostitution would seem to be so closely connected with public order and decency, the policy announced by the ordinance has been so long exerted

in all large cities of our country, and the power has had such frequent recognition in the charters of this city, that it would seem the power itself cannot be successfully controverted. City Charter 1870, § 12; *Id.* 1882, § 8; *Id.* 1896, § 15. We have, however, given careful attention to the argument that urges objection to all such legislation, and which directs attention to the grounds of opposition deemed specially applicable to the ordinance, the execution of which is sought to be arrested. That there are limitations to the power asserted by this ordinance may be conceded. It does not, however, readily occur to the mind that confining houses of this character within certain limits, by the appropriate ordinance is violative of any of the constitutional guaranties invoked in this discussion before us. The ordinance neither sanctions nor undertakes to punish vice. The power to punish vice, not in the form of an offense, denied by the argument and enforced by the authorities we find in the briefs, is, in our view, entirely distinct from the function the ordinance asserts as belonging to municipal government, by the express terms of the city charter. It is urged, too, the ordinance is a license for vice, and hence illegal. Tied. Lim., p. 291. Undoubtedly, the court should refuse its aid to any ordinance if of the character asserted by the argument. The vice, the subject of this ordinance, beyond the reach of penal statutes, is simply subjected by this ordinance to that restraint demanded by the public interest. The unfortunate class dealt with by the ordinance must live. They are not denied shelter, but assigned that portion of the city beyond which they are not permitted to establish their houses. Thus viewed, the ordinance cannot be deemed open to the objections that it either punishes or grants a license to vice beyond the competency of the council.

Again, it is urged that the ordinance is oppressive, unreasonable, and hence not to be enforced, because it seeks to confine the depraved women in too narrow limits. We find the testimony of this tendency in the record. If the ordinance is lawful, this question of space is, in our opinion,

confided to the council, and not for the courts. At any rate, we find no basis in the record to authorize the conclusion that the judgment of the council on this question is erroneous. There is the general proposition asserted by the argument that the correct policy is to diffuse the houses throughout the city, although the anticipated presence of the houses within half a square of the plaintiff's residence, and though on a different street, prompted this suit and vigorous opposition of the plaintiff. We cannot accept the view of public policy announced by the argument for the plaintiff, and, on that ground, set aside the action of the council.

The argument is advanced that houses once used for immoral uses, the subject of the ordinance, can never regain a reputable character; that the primary ordinance of this character gave the neighborhood it designated, and to the property within its limits, an ineffaceable stigma, depreciating for all times the value of the property; and hence it is argued that this first concession of private right for the public good is enough,—that is, the first exercise of power by the council is exhaustive of its power over the subject. The character of the houses within the limits first assigned is fixed forever. It is hence contended the limits cannot be changed, least of all extended, involving, as it would, a fresh and unnecessary sacrifice of private right. The effect of the argument, while conceding the function of municipal government to assign limits for such houses, is to affirm that this important municipal function, once exerted, can never be again exercised. The limits, we are told, must remain as originally fixed, irrespective of all those changes and public needs apt to arise, and to demand modifications of limits assigned years previously, for uses admitting of no suppression, but which can be restricted as to locality. It seems to us, if the functions asserted by the ordinance can be once exerted as the argument concedes, the more reasonable conclusion is that the function may again be called into exercise, to meet the changed conditions time has called into existence, and which appeal for

appropriate action to the municipal authorities. We cannot therefore assent to the proposition that, because limits for these houses were assigned perhaps more than three-quarters of a century ago, therefore the council cannot furnish in 1896 the legislation demanded by the public interest.

There remains the argument addressed to us, varied in form, but maintaining the general proposition that the ordinance operates to deprive the citizen of his property;—that is, to depreciate its value,—the same as deprivation in legal effect. We can readily appreciate there might be an arbitrary exercise of this power that would warrant an appeal to the courts. Thus, to extend these limits so as to embrace, without any apparent reason, if reason could exist, portions of the city always devoted to private residences, schools, churches, and other lawful uses, might well be deemed oppressive and an abuse of the power of municipal government; but, as we understand this ordinance, in its main features it is restrictive, —that is, confines these houses within narrower bounds. True, it takes in St. Louis street, or, as we believe, one side of the street excluded by the ordinance immediately preceding that now sought to be enforced. If it be true that St. Louis street—that is, both sides of it—was always without the area in which these houses were permitted, it is none the less true that St. Louis street has always been in close proximity to the space allotted to houses of prostitution. An extension of these limits, so as to take in that street, or rather that portion of it always alongside of the area for these houses, and at the same time greatly diminishing that area as previously delineated, does not strike us as arbitrary, or as calling for any substantial sacrifice of private rights beyond that required by antecedent ordinances. To whatever extent, however, the right of private property may be deemed affected by this last ordinance, it must be borne in mind that it is their great power of government given to preserve the morals, health, and lives of the community that requires the surrender of right by the citizens supposed to be exacted by this ordinance. To that police power all must yield obedience. As put in the text books,

and enforced by all decisions: "Every citizen holds his property subject to the proper exercise of the police power, exerted either by the legislature or by the subordinate political corporations. It is settled that police laws and regulations, though they may disturb the enjoyment of individual rights, are not unconstitutional. They do not expropriate property for public use. If the individual sustains injury, it is deemed *damnum absque injuria*; or, in the theory of the law, the injury to the owner is deemed compensated by the public benefit the regulation is designed to subserve." 1 Dill. Mun. Corp. p. 93. It is our conclusion, on every aspect of the case, that the ordinance is the exercise of lawful power, and no ground exists to enjoin the execution of that the ordinance proposes. *Id.* § 310; Black, Const. Law, p. 301; Dwarris, St. p. 455.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court in favor of plaintiff be reversed, and the injunction obtained by plaintiff issued be dissolved, his suit be dismissed, and that the judgment of the lower court dismissing the interventions, and dissolving the injunction granted on the prayer of one of them, be affirmed, and that plaintiff pay costs.

NICHOLLS, C. J., concurs in the judgment, but declines to sign it, for reasons orally assigned from the bench. BLANCHARD, J., concurs in the judgment, also, for reasons also assigned from the bench.

COMMONWEALTH

v.

ROSE *et al.*

(*Court of Appeals of Kentucky, Jan. 17, 1899.*)

Municipal Corporations—Effect of Failure to Classify.*—A municipal corporation established by order of a circuit court is not dissolved by the mere failure of the legislature to classify it, but remains a city of the sixth class until it is properly classified.

*As to Dissolution of Municipal Corporations, see generally 1 Dill. Mun. Corp. § 165 *et seq.*

Commonwealth *v.* Rose

APPEAL by plaintiff from Whitley county circuit court. *Affirmed.*

R. S. Crawford and *W. S. Taylor*, for the Commonwealth.
C. W. Lester, for appellees.

GUFFY, J. It is substantially alleged in the petition that for more than six months past W. C. Rose has, without warrant of law, assumed to execute and perform the duties, and accept and receive the fees and emoluments, of the office of police judge of the pretended town of Jellico, Ky.; that J. S. Bolton has in like manner assumed to perform the duties of town marshal of said pretended town; and that other named defendants are assuming in like manner to perform the duties of trustees of said pretended town; that in law the town of Jellico has no existence, and that defendants have no official authority at all, and that said offices of police judge, town marshal, and board of trustees do not exist; that no such town as the town of Jellico, Ky., has ever been assigned to a class by an act of the general assembly of the commonwealth of Kentucky, or been organized by judgment of the Whitley circuit court, the only court having jurisdiction so to do, since the adjournment of the general assembly of the commonwealth of Kentucky of its regular session of the year 1898. The petition further shows that the defendants are exercising and have exercised many other powers as officers aforesaid, and asks that the defendants be required to appear in court and show by what authority of law they are exercising the powers and privileges of said respective offices, and that all powers, privileges, grants, etc., exercised thereunder be declared void, and that defendants be perpetually restrained from exercising same, and that a writ of prohibition issue against them, and that they be prohibited from exercising any power or authority. By an amended petition, it is further alleged that the town of Jellico, Ky., was organized by a judgment of the Whitley circuit court at the regular term, 1894, of said court, and that said organization has never been assigned to any class by

any act of the general assembly, as required by section 156 of the constitution; that the first session of the general assembly of Kentucky, held thereafter, convened at the seat of government, at Frankfort, the first Monday in January, 1896; that no act was passed at said session assigning said organization to a class; that the defendants have assumed to officially act since the adjournment of the general assembly of 1896, and are so continuing to act, without authority of law, claiming the right to do so under the order of said court organizing same as a sixth-class town; that said organization ceased to exist, under and by provision of section 156 of the constitution, for want of assignment to a class,—which the plaintiff asked the court to adjudge, etc. A demurrer was sustained to the petition as amended, and the commonwealth has appealed.

The question presented for consideration is whether the failure of the legislature to assign said town of Jellico, as required by section 156 of the constitution, has the effect of dissolving the organization, or, in other words, to render null and void the judgment of the Whitley circuit court establishing said town. It is true that section 156 of the constitution requires that the cities and towns of this commonwealth, for the purpose of their organization and government, shall be divided into six classes; that the organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. It is further provided in the constitution what population shall constitute a city of the first class, and so on, concluding with the statement that all towns with a population of less than 1,000 shall belong to towns of the sixth class. It is also provided in said section that the general assembly shall assign the cities and towns of the commonwealth to the class to which they respectively belong, and change the assignment so made as the population of said cities and towns may increase or decrease, and, in the absence of other satisfactory information as to the population, shall

be governed by the last preceding federal census in so doing. The act of July 3, 1893 (sections 3713-3715, incl., Ky. St.), authorizes the circuit courts of the several counties to establish or organize towns. Section 3716, *Id.*, provides that such towns shall belong to cities of the sixth class until the same has been assigned by the general assembly to such class as it belongs, and that the provisions of the general laws relating to the towns of the sixth class shall apply to and be in full force and effect in said towns until such assignment is made. In Morton *v.* Woodford (Ky.) 35 S. W. 1112, it was held that the act authorizing circuit courts to establish towns was constitutional. It therefore follows that the Whitley circuit court had authority to establish the town of Jellico, and that when it was so established it became a town or a city of the sixth class; and by the provisions of the constitution, as well as the statute, it must so remain until it is assigned by the general assembly, as provided in section 156 of the constitution. But it is argued in this case that, inasmuch as the constitution required the assignment to be made at the first session of the general assembly after the organization of said town or city, unless the assignment is so made the organization ceased to be a town; or in other words, that the judgment of the circuit court establishing the town becomes null and void. We do not think that the contention of appellant is tenable. It would seem strange, indeed, that the mere failure upon the part of the general assembly to assign a town to the class to which it belongs, although required to do so by the constitution, can have the effect to abolish the town, and nullify the judgment of the circuit court legally and constitutionally rendered. It nowhere appears in this case that the failure of the general assembly to assign the town of Jellico to the class to which it properly belongs is or was the fault of the said town; and it would seem inequitable to hold that the failure of the general assembly to discharge its constitutional duty should operate to the disadvantage of these appellees, as well as the other citizens of the town of Jellico. It seems, therefore, that the

town of Jellico is, in fact and in law, at present a town of the sixth class, and entitled to exercise the rights and privileges by law given to towns of the sixth class; and that appellees are entitled, so far as this record shows, to exercise the duties, and receive the fees and emoluments, of the several offices which it appears they now hold and enjoy. Judgment affirmed.

KNIGHT

v.

CITY OF EUREKA.

(*Supreme Court of California, Dec. 29, 1898.*)

Appointment of Attorney—Delegation of Power.*—A city council cannot delegate to its attorney its discretionary powers in regard to the appointment of an assistant attorney.

APPEAL by plaintiff from Humboldt county superior court. *Affirmed.*

F. A. Cutler, for appellant.

A. J. Monroe, for respondent.

PER CURIAM. Action upon an express contract to recover for services as attorney at law. At the close of plaintiff's evidence, the court gave judgment of nonsuit, from which plaintiff appeals.

It appears that an action was brought against defendant in the circuit court of the United States, at San Francisco, on January 21, 1886, by certain Chinamen, who sued for damages alleged to have been suffered by reason of the destruction of their property by a mob in defendant city on February 27, 1885. These claims aggregated the sum of $132,820. Defendant employed S. M. Buck, Esq., by ordinance of its council, to take charge of the suit. The ordinance recited the pendency of the action against the city, and the necessity

*See note at end of case.

to retain counsel to defend it, and concluded as follows: "Therefore it is ordered that S. M. Buck, Esq., be and he is hereby, retained and authorized to act for the city of Eureka as its attorney in defense of said action; and he is also authorized to retain and associate with himself in defense of said action some able attorney and counselor residing in San Francisco, Cal., if, in his judgment, it becomes necessary. And said S. M. Buck, Esq., is instructed to conduct said defense as economically as it can be done consistent with vigorous and successful defense thereof." Acting under this authority, and not otherwise, Mr. Buck retained plaintiff, and entered into an agreement with him on March 2, 1889, by which he employed plaintiff as an attorney on behalf of defendant, to assist in the defense of said action, and, "on behalf of defendant, agreed to and with said Knight that said city of Eureka would pay him the sum of five thousand dollars for such retainer and services." Plaintiff "accepted said employment, and rendered such services for defendant from time to time in said action during its pendency as were required of him, such services consisting of consultations with S. M. Buck"; and the defendant in that action prevailed. It appeared that the council were not informed of Mr. Knight's employment until after Mr. Buck presented his claim for payment in May,1889, and not until in 1890, as Mr. Knight testified, at which time he presented his bill to the council. The reason for not sooner informing the council was stated to be that it was thought Mr. Knight could be more serviceable if his employment were kept a secret. He did not appear in court, but did talk with the attorney of the Chinamen about the case in addition to consulting with Mr. Buck. The extent or nature of plaintiff's services, however, does not seem to be material, as he does not sue for their value but upon the contract.

It is also immaterial that Mr. Buck had become the city attorney of defendant when he contracted with plaintiff, for the only claim of authority to make the contract rests upon the ordinance above quoted. The signal question in the

case is, was defendant bound by the contract? The legality of Mr. Buck's employment is admitted. It is also admitted that the council could have legally employed plaintiff to assist Mr. Buck. It is admitted, too, that the council could have authorized and directed Mr. Buck to employ appellant, for in that case the council would have exercised its judgment and discretion in determining that an assistant attorney was necessary, and that appellant was the choice of the council to perform the service. The point of objection to the ordinance seems to be that it substituted the judgment of Mr. Buck for that of the council. It is quite clear that the council did not determine that an additional attorney was necessary. That function was delegated to the employed attorney, Mr. Buck. He was to pass upon the question and to act upon his own judgment as to the expediency or necessity for retaining another attorney. Conceding the legality of Mr. Buck's appointment, we think it did not carry with it the authority to appoint an assistant attorney, nor could the council delegate its power to make such an appointment. Practically, the authority here delegated left with the agent of the council the discretion to determine the necessity for employing an assistant, and to fix his compensation. These were powers which, in our opinion, the council alone could exercise, and therefore could not be delegated. We find nothing in any of the cases decided by this court where the power of a municipal corporation to employ counsel was involved, from Smith *v.* Mayor, etc., 13 Cal. 531, to Merriam *v.* Barnum, 116 Cal. 619, 48 Pac. 727, contrary to this view. The power of boards of county supervisors and of the legislative bodies of cities and towns to employ counsel in certain cases has been frequently passed upon here; but no case has been called to our attention, and we think none can be found, holding that such bodies may appoint an attorney, and delegate to him the discretion to employ other attorneys, as in his judgment he may deem necessary or expedient, and fix their compensation. The correct principle is stated in Scollay *v.* Butte Co., 67 Cal. 249, 7 Pac. 661,

where it was held that the powers conferred upon a municipal corporation involving the exercise of judgment or discretion are in the nature of public trusts, and cannot be delegated to others. There are numerous cases where it has been held that the county boards of supervisors may authorize the employment of an attorney other than the district attorney under certain circumstances, as in Scollay *v.* Butte Co., *supra*; Hornblower *v.* Duden, 35 Cal. 664; Lassen Co. *v.* Shinn, 88 Cal. 510, 26 Pac. 365; Kelley *v.* Sersanous (Cal.) 46 Pac. 299, and some other cases; but in all of them the boards determined the necessity, made the selection, and fixed the compensation. In the case before us the council performed these functions as to Mr. Buck, but no further. The necessity for and the employment of plaintiff or some other able attorney were left entirely to the judgment and discretion of the attorney employed by the council. That it exceeded its authority in doing this is, we think, beyond doubt.

We are cited by appellant to section 90 of Mr. Dillon's Municipal Corporations, where it is said that corporations may exercise all the powers within the fair intent and purposes of their creation which are reasonably proper to give effect to powers expressly granted; and in doing this they have a choice of means adapted to ends. This is true, and it is upon some such principle that the appointment of an attorney by a municipal corporation may be made in certain cases, although the body is already provided by law with a legal adviser. But no authority can be derived from such an implied power to authorize its delegation. This power to appoint an attorney is one of those incidental powers which, of necessity, reside in the council, in order that its granted powers may be fully exercised, but is one of that class of powers devolved upon the council which, in their very nature, should be exercised by it, and could not with safety to the public, whose servants the members of the council are, be conferred upon an agent to exercise. No exigency or emergency is likely to arise where full opportu-

nity would not be given the council to act directly in selecting its own attorney or his assistant; and there is every reason why the power to do so should be lodged in the governing body itself. We think the true doctrine is correctly stated by MR. DILLON, at section 96: "The principle is a plain one that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others." See, also, Cooley, Const. Lim. 248. The case *In re* Flaherty, 105 Cal. 562, 38 Pac. 981, is cited by appellant, where a city ordinance prohibited the beating of a drum in the public street without the permit of the president of the board of trustees, which permit he was authorized to issue whenever in his judgment it was deemed expedient. The ordinance was held valid by a majority of the court, mainly, as we understand the prevailing opinion, as an exercise of the police power. We do not think that case is authority for appellant's contention here. The two cases rest upon wholly different reasons. The case now here is also quite unlike that of street superintendents, chiefs of police, and other municipal officers, whose daily duties make it not only reasonable and proper, but necessary, that they should exercise certain delegated powers, such as may be administrative or ministerial in their character. The case of City of Huron *v.* Campbell, 3 S. D. 309, 53 N. W. 182, is closely analogous to this. In that case the council authorized the city attorney to "appoint as many assistant attorneys as the mayor of the city may deem necessary to protect and defend in the various courts" certain suits. The ordinance placed the full control and management of all these suits with the mayor. The ordinance was held invalid, while holding that the council had authority itself to employ one or more assistant attorneys. The court said: "In fixing this compensation [*i. e.* of the city attorney] the city council must exercise its judgment upon that particular question; and, in determining the necessity for an assistant or assistants, the city council must equally exercise its judgment as to

Note

the necessity for an assistant or assistants, and the compensation to be allowed him or them." The judgment is affirmed.

NOTE.

City Councils—Delegation of Power.—The general legislative power residing in the State government may delegate to a municipal corporation some portion of its own powers which are held in subordination to the general power. But these delegated powers given for local objects are regarded as trusts confided to the hands in which they are placed, and are not subject to be delegated by the repositories of them. The rule is plain, then, that the legislative powers of a municipal corporation cannot be vicariously exercised. Oakland *v.* Carpenter, 13 Cal. 540; Meuser *v.* Risdon, 36 Cal. 239; Smith *v.* Morse, 2 Cal. 524; St. Louis *v.* Clemens, 43 Mo. 395; Matthews *v.* Alexandria, 68 Mo. 115, 30 Am. Rep. 776; Ruggles *v.* Collier, 43 Mo. 353; Thomson *v.* Boonville, 61 Mo. 282; Shehan *v.* Gleeson, 46 Mo. 100; Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80; Scofield *v.* Lansing, 17 Mich. 437; Lauenstein *v.* Fond du Lac, 28 Wis. 336; Lord *v.* Oconto, 47 Wis. 386; State *v.* Hauser, 63 Ind. 155; Indianapolis *v.* Indianapolis G. L. & C. Co., 66 Ind. 396; Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395; Thompson *v.* Schermerhorn, 6 N. Y. 92; Birdsall *v.* Clark, 73 N. Y. 73, 29 Am. Rep. 105; Davis *v.* Read, 65 N. Y. 566; *Re* New York Presbytery Trustees, 57 How. (N. Y.) Pr. 500; Brooklyn *v.* Breslin, 57 N. Y. 591; Lyon *v.* Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; Milhau *v.* Sharp, 17 Barb. (N. Y.) 435, 27 N. Y. 611; East St. Louis *v.* Wehrung, 50 Ill. 28; Bibel *v.* People, 67 Ill. 175; Kinmundy *v.* Mayham, 72 Ill. 462; Hickey *v.* Chicago, etc., R. Co., 6 Ill. App. 172; State *v.* Fiske, 9 R. I. 94; Hydes *v.* Joyes, 4 Bush (Ky.) 464, 96 Am. Dec. 311; State *v.* Jersey City, 25 N. J. L. 209, 26 N. J. L. 444; State *v.* Newark, 47 N. J. L. 117; State *v.* Paterson, 34 N. J. L. 163; State *v.* New Brunswick, 30 N. J. L. 395; State *v.* Trenton, 42 N. J. L. 74; State *v.* Trenton, 51 N. J. L. 498, 28 Am. & Eng. Corp. Cas. 161; Clark *v.* Washington, 12 Wheat. (U. S.) 40; Hitchcock *v.* Galveston, 96 U. S. 341; Mullarky *v.* Cedar Falls, 19 Iowa 21; Schenley *v.* Com., 36 Pa. St. 62; State *v.* Bell, 34 Ohio St. 194; Day *v.* Green, 4 Cush. (Mass.) 433; Coffin *v.* Nantucket, 5 Cush. (Mass.) 269; White *v.* Mayor, etc., of Nashville, 2 Swan (Tenn.) 364; Northern Cent. R. Co. *v.* Baltimore, 21 Ind. 93; Darling *v.* St. Paul, 19 Minn. 389; Dillon Mun. Corp. (4th ed.), § 96; Cooley Const. Lim. 204. In East St. Louis *v.* Thomas, 11 Ill. App. 283, it was held that the power to appoint attorneys, being vested by charter in the city council, cannot be delegated to the mayor by ordinance or otherwise, and an ordinance providing that in certain contingencies the mayor may appoint an attorney is void.

DOUGLASS

v.

CITY COUNCIL OF MONTGOMERY *et al.*

(*Supreme Court of Alabama, Nov. 5, 1898.*)

Public Parks—Abandonment.*—Municipal corporations hold the title to streets, public parks, etc., in trust for the public; and such trust property can no more be disposed of by the corporation than can trust property held by an individual.

Same—Adjacent Proprietor—Right to Enjoin.*—A person who can look out from the front of one of his houses, with an unobstructed view, on a public park, only 110 feet from him, is an adjacent proprietor; and can maintain a bill to enjoin a diversion and abandonpany of the land dedicated for such park, to the use of a railroad com pany for railroad purposes.

Same—Dedication.—A dedication, or a conditional dedication, to uses may be ingrafted on a fee-simple title conveyed for value.

APPEAL by complainant from Montgomery county chancery court. *Reversed.*

Fred S. Ball and *W. S. Thorington*, for appellant.

A. A. Wiley and *Chas. Wilkinson*, for appellees.

HARALSON, J. It is stated in 15 Am. & Eng. Enc. Law, 1064, that "municipal corporations hold the title to streets, alleys, public squares, wharves, etc., in trust for the public; and upon principle, such trust property can no more be disposed of by the corporation than can any other trust property held by an individual." In the note to the text, many decisions are cited in support of the principle stated. So, it has been held, that the trustees of a town have no authority to convey streets, alleys or public grounds, and such conveyances are absolutely void. Giltner *v.* Trustees, 7 B. Mon. 680; Morris *v.*

Public Parks—Abandonment.

*See notes at end of case.

Improvement Co., 38 N. J. Eq. 304, and authorities there cited; Harn *v.* Common Council, 100 Ala. 200, 14 South. 9; Webb *v.* City of Demopolis, 95 Ala. 116, 13 South. 289. In the case last cited, which had reference to a public street, —over which, in general, the city has greater authority in the matter of the direction of the uses to which it may be subjected than it has over a public park,—it was said: "The city never had any alienable title to or right in the street. It could never have granted it or any part of it away, for any purpose whatever. Having no power of direct alienation, it could not pass title indirectly by submitting for the statutory period to private possession, claim and use."

JUDGE DILLON states the rule to be,that "municipal corporations possess the incidental and implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute; they cannot of course, dispose of property of a public nature, in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets, or commons." 2 Dill. Mun. Corp. §§ 575, 650, and numerous authorities cited. Another phase of the rule should be added in this connection, as we find it stated in the Encyclopedia: "When lands, held by a municipality for public use, are not subject to any special trust, the legislature may authorize a municipal corporation to sell and dispose of the same or to apply them to uses different from those to which they are devoted, but in the absence of such authority, the municipality has no implied power to do so. * * * If, however, the lands have been dedicated by private individuals for a public park or square, the legislature has no authority to authorize any diversion from the uses to which they were originally dedicated." 17 Am. & Eng. Enc. Law, 417, and authorities.

In this case, on the 17th of September, 1850, F. M. Gilmer and his wife, in consideration of $300 paid to said Gilmer, by the city council of Montgomery, sold and conveyed to said city council a piece of land in said city, the subject of this suit,

which is particularly described in the conveyance, and is called "Gilmer Park." The conveyance contained the condition "said lands to be used only as a common or street; if otherwise, to revert to me or my heirs." The park, nor any part of it, has ever been devoted to street purposes; but, on the 19th February, 1877, as alleged, the city council of Montgomery, by ordinance, set apart and dedicated to the public use, as a public park or pleasure ground, the lands conveyed to them by said Gilmer, known as "Gilmer Park," which ordinance is still of force. It is further alleged, that shortly after the adoption of said ordinance, the said city council caused the said Gilmer Park to be inclosed with a fence, and caused a number of trees to be planted on or about it, and from that time down to about the 20th January, 1897, the said park remained inclosed, and was held and treated and used as a park, for the use and benefit of the inhabitants of the city of Montgomery, etc.

The said F. M. Gilmer died leaving a widow and two children. The defendant, the Alabama Midland Railway Company, purchased from his widow and these two children, for the recited consideration of $300, all their right, title, interest and reversion in and to the lands known as the "Gilmer Park." This company, according to the allegations of the bill, and as appears to be true, for the purpose of promoting its terminal facilities and its connection with the Mobile & Ohio Railroad Company, induced the city council of Montgomery by ordinance to grant to the Belt Line Railway Company—a local company in the city—the right to put down and operate an additional main line track through Gilmer Park, etc.; and, also, to adopt another ordinance at the same time—both ordinances having been prepared, as alleged, by the counsel of the Alabama Midland Railway Company, and introduced, adopted and approved on the same days. Manifestly, these ordinances constitute but one transaction, designed for the same purpose. The two might as well have been adopted as one. The latter ordinance, after reciting the sale by Gilmer of said park to the city; the

purposes of its conveyance; the condition of its reversion to his heirs; the purchase of the reversionary interest of the heirs of Gilmer by said Alabama Midland Railway Company, contains this further recital, by way of preamble: "And whereas, the exigencies of public business and the necessity of better transportation facilities have induced the city council of Montgomery, to grant to the Belt Line Railway Company, the right and privilege of laying down a railway track through, over and across said triangular park, otherwise called the 'Gilmer Park,' and to run and operate a dummy steam engine and cars thereon, thereby destroying the said parcel of land as a public park, and thereby causing a reversion of said realty to its rightful owners: Now, therefore, and for the purpose of abandoning in some public and authorative manner, the use of said land as a public park, be it therefore ordained by the city council of Montgomery, that said city council of Montgomery hereby abandons and discontinues the use of said ground or parcel of land as a park and for all other purposes; and hereby confirms, as far as the city council of Montgomery is able to do, the right, title, claim and interest of the said Alabama Midland Railway Company, its successors and assigns therein and thereunto forever. Adopted Jan. 13, 1897. Approved Jan. 18, 1897."

There is no disguise about these ordinances. The city authorities openly abandon whatever trust obligation had been imposed on them by the deed of Gilmer to the park, and their own act of dedication by said ordinance of the 19th of February, 1877, by which act of abandonment, as was supposed, the title would revert to the Gilmer heirs, whose reversionary interest, if they had any, the said Midland Railway Company had bought up. The effort was to invest the railroad company with a title to the property, by means of this violation of the trust of the city. The city authorities were induced into the scheme, by what, it is stated, appeared to them to be the necessity of better transportation facilities and the exigencies of the public business. We must acquit all engaged in this scheme,

of any intentional fraud upon the rights of the public; the one side, in procuring, and the other in yielding to, an abandonment of a public trust for another supposed public benefit. But, yielding to them a good and honest intention, what was accomplished, according to the authorities, was an illegal transaction and a fraud in law. The condition inserted in his deed by Gilmer, for a reversion of this property to him and his heirs, if the land should be used otherwise than as a common or street, was inserted, not as a provision to enable the city authorities to abandon or divert it at will, if accepted for the purposes intended, but to prevent their doing so. It was not a license for the violation of the trust tendered, if assumed, but a prohibition against such a violation. It is true, the deed did not make a positive dedication of the land for the purposes named, and it is also true, that the conveyance was made for a recited consideration of $300, and is, in form, a fee-simple title, containing the condition for reversion, if the land conveyed should be used otherwise than as a street or common. Without such condition, it may be that the price for the land would have been much greater. Certainly such a condition in any deed tended to impair the value of the lands conveyed. It was an incumbrance on a free title. We know of no rule which prevents a dedication to uses from being ingrafted on a fee-simple title conveyed for value, nor do we know of any rule which prevents the ingrafting of a conditional dedication to uses in such a conveyance; the dedication to be completed and irrevocable on the acceptance of the conveyance with the conditions imposed. If it had been recited in said deed, that the city had agreed to accept the conveyance on the conditions imposed, and had by ordinance set apart and dedicated the land to the public for the uses prescribed, as a consideration for procuring the conveyance, could it be doubted that the conveyance on such terms would have been less than a dedication, and that its charter as such would have been destroyed, because of a condition in the

Same—Dedication.

conveyance, that if the grantee violated the terms of the deed in this regard, the property should revert to the heirs of the grantor? It is not left open to doubt, that there had been negotiation on the part of the city with Gilmer for the procurement of this land, and as to the purposes for which it was to be procured. Gilmer did not desire the property ever to revert. The clause referred to in his deed was not inserted in his interest or that of his heirs, but in the interest of the public, and was as strong as he could devise to prevent, in the future, an abandonment of the trust he reposed in his trustee for uses,—the city of Montgomery. The city elected to accept the trust as and for a dedication for a public park, as is evidenced by their said ordinance to that effect, adopted the 19th February, 1877. In this said ordinance, they recited: "Whereas, some of said parcels (referring to certain small tracts or parcels of land in a triangular shape) were granted to the city on condition and in trust that they should be devoted to public use as parks or pleasure grounds, and whereas, the health and comfort of the citizens and the best interests of the city will be promoted by converting the said parcels of lands into parks and pleasure grounds," therefore be it ordained, etc., followed by a dedication of said park to the public use as a park or pleasure ground. After this, the conveyance of Gilmer became as operative as a dedication, as much so as if such a use had been unconditionally ingrafted in the deed at its execution. The public became thereby invested with dedicated rights and interests. The trustee violated the trust, and aided in diverting the dedication. This was a wrong from which no right could accrue to any one who claims in consequence of such an act.

Same—Adjacent Proprietor—Right to Enjoin.

It remains to inquire, if the complainant is such a party as can maintain a bill to enjoin the abandoment and destruction of this park. He may not be an abutting owner, strictly speaking. He owns two lots on the west side of Catoma street, the first, next to and adjoining an abutting owner, who owns a small lot between him

and the street in front of the park. From the front of complainant's door, diagonally across the street, on the left, to the park, it is 110 feet,—open and unobstructed. He also owns another lot, on the same side of said street with an intervening lot between it and the first one referred to, 250 feet from said park.

Ordinarily, the city is the proper party to redress a wrong of the character here complained of; but in this instance it is the main actor in the commission of the wrongs complained of, for the abandonment and destruction of the park. It is to be presumed, it would not file a bill to declare void an act which, by solemn ordinance, it had itself just done. Individuals damaged by such action, therefore, were driven to private action for the maintenance of any rights they had in the premises.

There are authorities which hold, that nonabutting property owners upon a square or park cannot complain of its being closed by municipal authority; but with such a doctrine, if necessary to decide, we might not agree. There is a marked difference between the uses and trusts as ordinarily imposed in the dedication of streets or highways in a city, and those imposed in the dedication of public squares or commons, and in the uses and enjoyments of the people therein. The municipality may allow uses in the one that it cannot in the other. The uses of each are distinct, and the rights of abutting proprietors on each, are different. It is allowed, generally, that such a proprietor as to a street owns to its center, but there is no such right, or anything accruing from it, in an abutter on a park. The street must be kept open, as long as used, but the park may be inclosed, improved and ornamented for pleasure grounds and amusements, for health and recreation. 17 Am. & Eng. Enc. Law, 416. In speaking of this difference between the rights of property owners attingent to a street and a public common, dedicated to public uses, this court, in Railway Co. *v.* Rand, 83 Ala. 294, 3 South. 686, said the rule of law was entirely different when applied to the two; that "the purpose to which such

dedication is made, the use or changing uses to which it may be applied, and many other distinguishing characteristics, demonstrate that neither the rule nor the reason of the rule, on which the law of the street or highway rests, can be made applicable to a public common. The differences will naturally suggest themselves, and we need not attempt their enumeration."

In respect to the remedy for the misuse or diversion of such property, it has been said: "If dedicated property be put to use foreign to that contemplated by the intention and purpose of the dedication, then not only the dedicator, but any property owner will have his remedy in equity to enforce the proper use, and inhibit an improper one." 5 Am. & Eng. Enc. Law, 416, and authorities there cited.

In Maywood Co. *v.* Village of Maywood, 118 Ill. 61, 6 N. E. 866,—a bill filed by the village and Small and Hubbard, residents therein, to prevent obstructions to a public park,—it was said: "The objection of multifariousness or misjoinder of complainants we do not regard as well taken to the bill. Small and Hubbard, as residents of the village, have a common interest with each other and with the village itself, in preventing any obstruction to the use of the public square for the purposes of a park. * * * Again, the evidence shows a threatened nuisance tending to deprive appellees and others of the full and free use of this park, as they were entitled to have it used. This is a well-recognized ground of equitable interposition." Zearing *v.* Raber, 74 Ill. 409. When a dedication of land for a public park is made by or to a town or city, it inures to the benefit of all who are at the time, or may afterwards become citizens of the municipality, which holds in trust for the benefit of the public, with no power to convey or divert it to other uses. This right of use belongs equally not only to lot holders of the corporation, but to all the inhabitants, in the future as well as at present, according to their various necessities or conveniences. Mayor, etc., *v.* Franklin, 12 Ga. 239; Alves *v.* Town of Henderson, 16 B. Mon. 131, 169; Campbell Co. Ct. *v.* Town

of Newport, 12 B. Mon. 541; Pomeroy *v.* Mill, 3 Vt. 279; Com. *v.* Rush, 14 Pa. St. 186; Carter *v.* City of Portland, 4 Or. 346; City of Alton *v.* Illinois Trans. Co., 12 Ill. 38; City of Quincy *v.* Jones, 76 Ill. 231; Railway Co. *v.* Rand, 83 Ala. 294, 3 South. 686; 2 Beach, Inj. § 1279, and authorities cited in note 1.

It is unnecessary, perhaps, for us to decide in this case, that any resident taxpayer in a city or town may maintain a bill to enjoin a diversion and abandonment of grounds dedicated for a public park, to the use of individuals and corporations for their own private use and advantage, in interference with or destruction of the rights of the public therein. It appears, however, that reason and authority are not wanting for such a holding. In these days of rapid and cheap transit in cities and towns, brought about by the applications of steam and electricity, it would seem that every resident property holder of the municipality, occupies, in a sense, the position of an adjacent owner to its public parks, dedicated to public use, and is clothed with all the valuable rights and interest in such dedications, as the one whose property abuts them. These parks, by these means, are the great resorts for health and recreation by all the inhabitants of the municipality, valuable and beneficent in their advantages to all alike. The one living remote, is borne in a few minutes, at the cost of a trifle, to and from these grounds, and derives as much rest, recreation and profit, from their existence, as the one in closer proximity may enjoy. When the hand of vandalism and destruction is laid upon them, by the municipality itself or by strangers, it is difficult to understand, upon what principle, any individual property owner, without respect to where he lives in the city or town, may not himself invoke injunctive relief against their destruction or misuse when perpetrated by the municipality, or join it for such relief, against such acts when done by others. If there ever existed any good reason why such relief should be invoked alone by an abutting proprietor, it may be that it must give way, in accommodation to

the necessities and conditions of modern life, brought about by the wonderful discoveries of the present age.

But, we find no difficulty in holding, that the complainant in this case is in reason, and for the purposes of this case, an adjacent proprietor to the said park, and occupies such a position as entitles him to maintain this bill. He can look out from the front of one of his houses, with an unobstructed view, on to the park, a distance of only 110 feet from him. This gives him the attitude of an adjacent proprietor. From his other lot, the view is obstructed, though it is only 250 feet from the park. For the purposes of aid and recreation, he has a direct and special interest against its proposed destruction.

The cause was submitted on a motion to dissolve the injunction theretofore granted, and on motion to dismiss the bill for want of equity. The court by its decree dissolved the injunction, and dismissed the bill for want of equity. In this there was error.

The decree is reversed and the cause remanded.

COLEMAN, J. (dissenting). This cause was submitted to the chancery court on a motion by respondents to dissolve an injunction and on a motion to dismiss the bill for the want of equity. The chancellor granted the motion to dissolve the injunction and dismiss the bill for want of equity. From the decree dissolving the injunction and dismissing the bill the present appeal was prosecuted by the complainant, and the correctness of this decree presents the only question for review. This court has no jurisdiction to render a final decree granting relief to complainant upon the present appeal. A motion to dismiss a bill for want of equity cannot perform the office of a demurrer. On such a motion all amendable defects will be considered as made. The material questions are: Has the bill equity? and, if the averments of the bill show a state of facts which justify relief, can the bill be maintained by the complainant? The purpose of the bill is to enjoin the respondent railroads from laying tracks upon and across a plat

of land in the city of Montgomery designated as "Gilmer Park," and to set aside and annul certain ordinances of the city, by which the respondent railroads were authorized to make such use of said plat of ground. The rule is general and well established that a municipal corporation has no power, unless specially authorized by the legislature, to sell for its own benefit, or to appropriate for the use and benefit of private persons or corporations, a public park or common; and, if this was the only question involved, we would have little difficulty in reaching a conclusion. The question presented is whether Gilmer Park was held by the city of Montgomery upon such terms and conditions as to justify the application of the general rule to the case at bar; and, secondly, whether a municipal corporation, when it has once appropriated a plat of ground as a public park, is compelled to maintain it as such for all time, although, by reason of circumstances and changed conditions, it is no longer adapted to, or is useful for, such purposes. It is probable that the latter question more properly arises upon the motion to dissolve the injunction upon the denials of the answer. Francis M. Gilmer sold and conveyed to the city of Montgomery said plat of land for $300, and the deed of conveyance provides that "said lands to be used only as a common or street, *otherwise to revert to me or my heirs.*" (We italicize.) This conveyance is not a dedication to the city, nor did the city acquire an absolute, unconditional title and estate in the land. In our opinion, the legislature would be powerless to authorize the city to sell the plat of land so as to convey a title to a purchaser. Much less, without such authority, could the city sell or appropriate it to other purposes than for a street or common. 2 Dill. Mun. Corp. § 651, and note. The land belonged to Gilmer. He had the right to dispose of it on such terms, and for such purposes, as he saw proper, not inconsistent with any law or the public good. The provision in the deed, "said lands to be used only as a common or street, otherwise to revert to me or my heirs," was as much a part of the consideration for the sale and

conveyance as the $300. A dedication, after it becomes effective, is irrevocable. An easement may be legally abandoned. The fee is then released from the burden of the easement, and the owner comes into possession as before the dedication. No court, nor the city of Montgomery, nor the legislature, has the power to eliminate from the deed of conveyance the provision which declares that, if the land is used for other purposes, "it is to revert to me or my heirs." To hold otherwise would invade the sanctity of contracts, and destroy rights reserved by solemn deed. Persons erecting improvements or making investments with reference to Gilmer Park, and having notice, actual or constructive, of the terms and conditions upon which the city acquired the land, have no cause of complaint against the grantor or his heirs. He had the right, in making the sale, to contract for the conditions upon which the land should revert, and the city acquired and held the land upon these terms and conditions, and no other. The case is different where there has been irrevocable dedication, or where the municipality purchases land, and obtains an absolute, unconditional, indefeasible estate in fee. According to the averments of the bill, the city of Montgomery has abandoned the land as a park or street, and, so far as it is competent to act, has devoted the land to other purposes than "as a street or common;" but complainant's contention is, and the equity of the bill rests upon the contention, that any act of the city of Montgomery, by which the land might revert to the grantor as provided in the deed, is null and void. The equity of the bill, summarily stated, is that the provision in the deed of conveyance of Gilmer to the city, "said lands to be used only as a common or street, otherwise to revert to me or my heirs," is without legal force, and ought to be stricken out. Certainly the parties to the deed did not so understand it, and we know of no rule of equity or justice which sustains the contention. It may be that, by some act of Gilmer, he is estopped from asserting any claim or right reserved or provided for by virtue of the deed, and the bill may be capa-

ble of amendment, so as to give it equity in this respect. We are unable to say.

The bill shows clearly that the other citizens of Montgomery will suffer like inconveniences and deprivations as himself by destruction of the park and the running of railroad engines over the land. Conceding that the bill shows that application to the city authorities for redress would be useless, has a single citizen of Montgomery, in his own name, the right to file a bill to redress what is shown to be a public wrong, if a wrong at all? Should not the bill be filed in the name of all or such as are willing to come in as complainants? To authorize a bill in the name of a single person, must it not aver, not by way of conclusion, a special injury, but the facts which show a special injury different from that sustained in common with others? 2 Dill. Mun. Corp. § 920, and note; Church *v.* City of Portland(Or.) 6 Lawy. Rep. Ann. 259, and notes (s. c. 22 Pac. 528). These questions are not raised by demurrer, and are not before us on this appeal. We merely suggest for inquiry.

We will refer briefly to the decree dissolving the injunction. On page 38 of the record it is said: "This cause coming on to be heard on motion to dissolve the injunction, on the sworn denials of the answer, and to dismiss the bill for want of equity." We regard this as a submission upon the answers of all the defendants. Many exceptions are taken to answers which were not considered by the court. Leaving out of consideration all the averments of fact except those responsive, and such as should be considered on a motion to dissolve the injunction, under our view of the law, we are of the opinion the injunction was properly dissolved. We will reverse the decree dismissing the bill, and remand the cause, that complainant may have an opportunity to amend the bill as he may be advised. Thirty days will be allowed from the date of this decree within which to amend the bill, and, if not amended within the time, the court, at any regular term thereafter, shall dismiss the bill absolutely.

Notes

Change of Use of Public Squares and Parks.—When lands held by a municipality for public use are not subject to any special trust, the legislature may authorize the municipal corporation to sell and dispose of the same, or to apply them to uses different from those to which they are devoted, but in the absence of such an authority the municipality has no implied power to do so. Payne *v.* Treadwell, 16 Cal. 230; Kreigh *v.* Chicago, 86 Ill. 407; Quincy *v.* Jones, 76 Ill. 231; Alton *v.* Illinois Transp. Co., 12 Ill. 38; Bucker *v.* Augusta, 1 A. K. Marsh. (Ky.) 9; Alves' Executors *v.* Town of Henderson, 16 B. Mon. (Ky.) 131; Mayor *v.* Hopkins, 13 La. 326; Mayor *v.* Leverich, 13 La. An. 212; De Armas *v.* New Orleans, 5 La. 132; McNeil *v.* Hicks, 34 La. An. 1090; Police Jury *v.* Foulhouze, 30 La. An., Pt. 1, 64; Com. *v.* Rush, 14 Pa. St. 186. If the title to lands has been acquired by condemnation proceedings, the legislature may authorize a sale thereof if the fee is vested in the city, although the title of the city must be deemed to have been impressed with a trust to hold the lands for the uses for which they were condemned. Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234.

If, however, the lands have been dedicated, by a private individual for a specific use,—as for a public park or square,—the legislature has no authority to authorize any diversion from the use to which they were originally dedicated. Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540; Warren *v.* Lyon City, 22 Iowa, 351; Le Clercq *v.* Trustees of Gallipolis, 7 Ohio, 218. The trustees of a town were about to open up a public park and run streets through it. The original owner of the land had designated four acres as a park upon the plat of the town. By statute, the effect of the plat was to vest the title of the land in the corporation for the uses and purposes expressed upon it. The court enjoined the trustees from running the streets through the park, and held that the park should ever remain public and in the condition in which it was donated. Price *v.* Thompson, 48 Mo. 361. Land dedicated for use as a public square cannot be appropriated by a railroad company for the purpose of constructing its tracks. Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540. And when land has been dedicated to use as a court house square, the legislature cannot authorize the municipality to sell it and apply the proceeds to the erection of a court house. Franklin County *v.* Lathrop, 9 Kan. 453.

When lands are dedicated to the public for particular purposes, they may be improved and controlled for such purposes, but the city cannot appropriate to itself the exclusive use thereof. Alton *v.* Illinois Transp. Co., 12 Ill. 38. But where land is described on a recorded plat simply as "public grounds" there is an unrestricted dedication to public use, and as between the municipal corporation

Notes

holding the title to the ground and the general public, the legislature may direct the particular public uses to which the land shall be put. Accordingly, the legislature may authorize the construction of a railroad through it, the appropriation of property to the construction or use of a railroad being an application thereof to a public use. Chicago, R. I. & P. R. Co. *v.* Joliet, 79 Ill. 25.

The original owners by whom land has been dedicated to a particular use have sufficient interest to enforce the trust and restrain any proposed violation of the grant. Warren *v.* Lyons City, 22 Iowa, 351. And, in the case of an attempted diversion of land dedicated to a specific use an injunction will be granted either at the suit of the city, the trustee; or at the suit of individuals owning lots abutting upon the lands. Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540; Le Clercq *v.* Trustees of Gallipolis, 7 Ohio 218; Jacksonville *v.* Jacksonville R. Co. 67 Ill. 540.

Same—Suit by Non-Abutting Owner.—A property owner and taxpayer whose property does not abut upon a public square, cannot maintain a suit to enjoin the city from erecting a public building on the square, except it be shown that he would suffer special injury therefrom. City of San Antonio *v.* Stumburg, 70 Tex. 366. GAINES, J., who delivered the opinion of the court said: "We think it a principle established by the overwhelming weight of authority in the courts of all countries subject to the common law that no action lies to restrain an interference with a mere public right, at the suit of an individual who has not suffered or is not threatened with some damage peculiar to himself. As applied to public nuisances the doctrine is elementary. 2 Cooley, Bl. 219. For a special damage resulting from the invasion of a right enjoyed by a party in common with the public, the law affords him a remedy by private action, but if the damages he suffers are only such as are common to all, the action must be brought by the lawfully constituted guardian or guardians of the public interest. The principle has been frequently applied in this court to another class of cases, and the right of an individual to sue without showing some special damage either supposed or threatened has been uniformly decided. Walker *v.* Tarrant Co., 20 Tex. 16; Harrel *v.* Lynch, 65 Tex. 146; Caruthers *v.* Harneft, 67 Tex. 127; Worsham *v.* Richards, 46 Tex. 441. In Williams *v.* Davidson, 43 Tex. 1, and Shephard *v.* Barnett, 52 Tex. 638, the special damages were shown, and the right to maintain the action is placed expressly on this ground. For a full discussion of the authorities, see Wood, Nuis. § 645 *et seq.* See, also, Marini *v.* Graham, 67 Cal. 130; Ward *v.* Little Rock, 41 Ark. 526, 8 Am. & Eng. Corp. Cas. 397, 1 High, Inj. §§ 762, 763, and cases cited. It has been intimated that the reason this rule was established was in order to prevent a multi-

plicity of suits which might result if each individual were permitted to sue for damage resulting from a public nuisance which was common to all others, but we apprehend that the underlying principle is that individuals have a right to sue for a redress of their own private injuries, but for such as affect all the public alike an individual is not the representative of the public interest. The legislature of the state represents the public at large, and has full and paramount authority over all public ways and public places. 2 Dill. Mun. Corp. 656. A suit in such case must be brought by such officer or officers as have been intrusted by the law-making power with this duty."

STATE (ROBERTS PROSECUTOR)

v.

CITY OF CAMDEN *et al.*

(*Supreme Court of New Jersey, Feb. 27, 1899.*)

Powers of City Council—Qualifications of Members.*—Where, by charter, a city council is made sole judge of the election returns, and qualifications of its own members, its action, seating a member after investigation, is final and conclusive, although the council must organize annually, while membership may extend beyond the term of the council as then organized.

Resolution to Strike from Roll of Membership—Certiorari.—If a resolution be offered in a city council to strike from the roll the name of a member seated by the preceding council, whose term has not expired, and to substitute that of another person in his stead, such resolution may be removed to this court by *certiorari*, without awaiting action thereon by the council.

(Syllabus by the Court.)

ARGUED November term, 1898, before LUDLOW and COLLINS, JJ.

H. M. Snyder, Jr., for prosecutor.
E. G. C. Bleakly, for defendant.

COLLINS, J. The council of the city of Camden is, by the charter of that city, made the sole judge of the election returns

*See note at end of case.

and qualifications of its own members. P. L. 1871, p. 224, § 26. At the charter election held in 1897, John S. Roberts was elected a member of such council from the Third ward of the city for the term of three years, was sworn, and took his seat in due course. His title was challenged by Dr. William Shafer, and, after investigation, was, on January 4, 1898, by resolution, confirmed. At the next charter election the personnel of the council was in some degree changed, and at the organization meeting in 1898 a resolution, directing that the name of John S. Roberts be stricken from the roll, and that of William Shafer be inserted thereon as the representative of the Third ward, was introduced in the council. Before any action thereon, that resolution was removed to this court by the present writ. It has already been decided that where a city council is made, by the charter, the sole judge of the election and qualification of its members, its action in seating a member after investigation of his title to membership is final and conclusive; and that a resolution offered in a succeeding council to investigate such title may be removed to this court by *certiorari* before action thereon. Kendell *v.* City of Camden, 47 N. J. Law, 64. This would seem to demonstrate the illegality of the resolution now challenged, but the defendants seek to up hold it on the ground that the charter provision above cited has *pro hac vice* been superseded by action under the general election law of the state. In Henry *v.* City Council of Camden, 42 N. J. Law, 335, it was held that the law itself did not repeal this charter provision; but MR. JUSTICE DEPUE, *in Re* Recount of Votes in Newark, 15 N. J. Law J. 10, expressed the opinion that the general law applies, notwithstanding city charters; that is, that charters do not furnish an exclusive means of inquiring into municipal elections. Accordingly, it has been proved in this case that a justice of this court, under section 52 of the election law of 1890 (2 Gen. St. p. 1341, pl. 284), by orders made April 29, 1897, set aside and nullified Mr. Roberts' election, and ordered a new election on May 18,

Case Stated.

Powers of City Council—Qualifications of Members.

Note

1897, at which Dr. Shafer was chosen, and his election duly certified. It is claimed, therefore, that the action of the former council in seating Mr. Roberts was altogether ineffectual, and that, by adopting the resolution brought up by the present writ, the new council would simply be recognizing a lawful adjudication by a competent tribunal that Dr. Shafer was the *de jure* member of the council from the Third ward. Although some of the provisions of the general election law for contesting elections have been upheld as supplemental to the electoral machinery (Conger *v.* Convery, 52 N. J. Law, 417, 20 Atl. 166; Convery *v.* Conger, 53 N. J. Law, 468, 22 Atl. 43, 549; Id., 53 N. J. Law, 658, 24 Atl. 1002), it would seem that all such supplemental proceedings are but presumptive in effect, leaving free the tribunal whose function may be ultimately to judge of the validity of an election. If this be the true view, the council was within its rights in its action of January 4, 1898, which, as appears, was taken after considering both elections. But, as, by the statute relied on by defendants, the certificate of the new election was, within constitutional limits, made final and conclusive on all persons and parties, it is argued that the city council was by it concluded. It is not worth while to consider this question, for by the decision of the case of Roberts *v.* Shafer (rendered at the present term) 42 Atl. 770, this court has held nugatory the enactment itself. The resolution removed is therefore set aside, with costs.

Resolution to Strike from Roll of Membership—Certiorari.

NOTE.

City Councils—Qualification of Member—Conclusiveness of Finding.—Where, by charter, a city council is made the judge of the election returns and the qualifications of its own members, its action seating a member is final and conclusive, and the question of such member's eligibility cannot be opened by a subsequent council. Doran *v.* De Long, 48 Mich. 552; Kendell *v.* Camden, 47 N. J. L. (18 Vroom) 64; Hadley *v.* Mayor, 33 N. Y. 603, 1 Dill. Mun. Corp. (4th Ed.) § 200 *et seq.*

STATE *ex rel.* GOULDEY

v.

CITY COUNCIL OF ATLANTIC CITY.

STATE (WIESENTHAL, PROSECUTOR) *v.* GOULDEY. SAME *v.* CITY COUNCIL OF ATLANTIC CITY.

(*Supreme Court of New Jersey, March 7, 1899.*)

Officers—Powers of City Council—Construction of Charter.*—Under the charter of Atlantic City (P. L. 1866, p. 314) the city council must elect or appoint all the subordinate officers of the city whose election or appointment is not otherwise provided for by the charter, and cannot delegate its power of election or appointment to any other body.

Same—Same—Same.—Only the city council can appoint a chief engineer of the fire department, and the selection of such an officer by the fire companies, in pursuance of the provisions of a city ordinance, has no legal force.

Reconsideration of Vote.—All deliberative assemblies have a right, during the same session, to reconsider any vote that they may have taken; and only the final result is operative.

Unauthorized Assembly—Proceedings—Review.—The doings of a body which has no legal powers to exercise, and no legal duties to perform, can neither be reviewed by *certiorari* nor controlled by *mandamus*.

Costs.—On dismissing a rule to show cause why a *mandamus* should not issue, no costs can be awarded.

(Syllabus by the Court.)

ARGUED February term, 1899, before LUDLOW and DIXON, JJ.

John W. Westcott and *Samual F. Perry*, for relator, Gouldey.

L. Cole, for prosecutor, Wiesenthal.

Godfrey & Godfrey, for respondent, city council.

*See Knight *v.* City of Eureka (Cal.) *ante*, p. 247 and *note*, p. 252.

State *ex rel.* Gouldey *v.* City Council of Atlantic City

DIXON, J. In pursuance of an ordinance of the council of Atlantic City, 40 delegates, from the 8 companies, comprised in the fire department, met in convention on January 10, 1899, to choose a chief engineer. Having adopted a rule that a majority of the complete delegation should be necessary to a choice, the convention proceeded to balloting. On the twenty-third ballot the chairman, being informed by the tellers that Isaac Wiesenthal had received 22 votes, declared him elected, but immediately afterwards, on discovery that 41 votes had been cast, he withdrew that declaration, decided that the ballot was illegal, and ordered further balloting. From this action no appeal was made, and on the next ballot 40 votes were cast, of which John Gouldey received 21. Thereupon the chairman declared Gouldey to be elected, and the convention, without a dissenting vote, ordered its officers to certify his election to the council for confirmation, and such a certificate was accordingly made. These facts give rise to the present controversies, one design of which is to command the council to confirm Gouldey's election, another is to set aside the certificate of Gouldey's election, and the third is to command the officers of the convention to certify to the council the election of Wiesenthal.

Case Stated.

We think none of these designs can be effectuated. The ordinance in question, which derives its validity from the chartered authority to pass ordinances for the prevention and suppression of fires, makes the position of chief engineer a municipal office, having a fixed term, definite duties, and a stated annual salary. The sixth section of the charter (P. L. 1866, p. 314) gives the council power to elect and appoint all the subordinate officers of the city, as well those named in the act whose appointment or election is not there provided for, as those not named in the act, and who may, in the opinion of the council, be necessary for the ordering and governing of the city, for the preservation of its health, or its convenience and safety. In Volk *v.* Mayor, etc., 47 N. J. Law, 117, a

Officers—Powers of City Council—Construction of Charter.

provision almost identical with this was held applicable to the appointment of a captain of police. As clearly it applies to the appointment of a chief engineer, thus designated in the ordinance and recognized in the charter as an officer. Stewart *v.* Board, 61 N. J. Law, 117, 118, 38 Atl. 842, and cases cited. This power to elect or appoint, conferred by the charter on the council, cannot be delegated by the council to any other body (Winants *v.* Mayor, etc., 44 N. J. Law, 114), nor can the council, by ordinance or otherwise, devest itself or its successors of the power and the corresponding duty to exercise the power in substantial accordance with the purpose of the law (Volk *v.* Mayor, etc., 47 N. J. Law, 117; Horan *v.* Lane, 53 N. J. Law, 275, 21 Atl. 302; Commissioners *v.* Cramer, 61 N. J. Law, 270, 39 Atl. 671). It follows from these considerations that the duty of the council is to select a chief engineer independently, that it is under no obligation to appoint Mr. Gouldey, and therefore a *mandamus* directing it to do so cannot be allowed. It follows, also, that the convention of delegates was a body having no legal status, incapable of affording to the person of its choice any legal claim to, or advancement towards, the office of chief engineer. The legal effect of its action was no greater than would have been that of any other meeting of citizens. Having no legal powers to exercise, nor legal duties to perform, its doings can neither be reviewed by *certiorari* nor controlled by *mandamus*. Watson *v.* Society, 38 N. J. Law, 377; Drake *v.* Plume, 44 N. J. Law, 362; Vreeland *v.* Jacobus, 26 N. J. Law, 135. But, even if we should regard this convention as one having a legal status, we would find nothing unlawful in the certificate that Gouldey had been chosen. All deliberative assemblies have a right, during the same session, to reconsider any vote which they may have taken, and only the final result is operative. State *v.* Foster, 7 N. J. Law, 101; State *v.* Justice, 24 N. J. Law, 413;

Same—Same—Same.

Reconsideration of Vote.

Unauthorized Assembly—Proceedings—Review.

Shreve *v.* Crosley, 36 N. J. Law, 425; Baker *v.* Cushman, 127 Mass. 105. When, therefore, the convention acquiesced in the chairman's withdrawal of the announcement which he had made on partial information, and in his decision that the twenty-third ballot was illegal, and proceeded to ballot again, it, in effect, reconsidered its former action, even if that action showed Wiesenthal to have been selected, and thereupon the convention finally chose Gouldey. The certificate of that choice was the true expression of the result attained. The *certiorari* should be dismissed, and the rules for *mandamus* should both be discharged. In the *certiorari* proceedings the defendants are entitled to costs. In the *mandamus* proceedings no costs can be awarded. Hopper *v.* Freeholders, 52 N. J. Law, 313, 19 Atl. 383.

Costs.

BANCROFT

v.

CITY OF SAN DIEGO.

(*Supreme Court of California, March 25, 1898.*)

Streets—Change of Grade—Street Railway—Damage—Liability of City.*—In an action against a city for damages to abutting property alleged to have resulted from a change of grade by the city, defendant cannot be held liable for a diminution of the value of such property caused by a prior construction of a railway company's street-railway, although the company raised the street to the official grade, in order to place its tracks on such grade, as it was required to do by its franchise from the city.

Same—Same—Same—Same—Same.—Where a street railway company, for its own exclusive advantage, lays its tracks upon a street which the city is not prepared to grade, the company, and not the

*As to Change of Grade, see generally Ehrsam *v.* City of Utica (N. Y.), *ante*, p. 70 and *notes*, p. 73 *et seq.*

city, is liable for injuries to abutting property resulting from the company's work.

Same—Same—Agency.—The company was not the agent of the city in raising the grade, the grant of the franchise not having imposed upon the company the duty of changing the grade, but only required the company to place all its tracks on the official grade established by a prior ordinance.

Charter Provisions—Presentation of Claim.*—The fact that plaintiff's claim was never presented to the city council for allowance, nor filed with the clerk or secretary of the auditing committee, precluded recovery in such action, as a compliance with such requirements of defendant's charter, within six months after plaintiff's claim for damages accrued, was, by implication, a condition precedent to a right of action.

Same—Citation—Mistake of Counsel.—The question whether such requirements had been complied with having been properly raised, the fact that defendant's counsel cited a wrong provision of the charter in support of his contention was immaterial.

APPEAL by defendant from San Diego county superior court. *Reversed.*

H. E. Doolittle and *T. L. Lewis*, for appellant.

M. A. Luce, for respondent.

TEMPLE, J. This action is for damages suffered from a change in the grade of a street upon which plaintiff's property abuts. In the complaint it is alleged that plaintiff owns block 227 in Horton's addition to the city of San Diego, which block abuts on Fifth street for the entire distance between Fir and Elm streets. In 1887 the city established a grade to said street in front of plaintiff's block, and thereafter the street was graded to said grade. The result of the grading was that plaintiff's property was in a hollow or depression, varying from 2 to 20 feet below the street. It is then charged that afterwards, on the 10th of October, 1889, the city, by ordinance, changed the official grade of the street, raising the same from 1½ feet to 3 feet in front of plaintiff's property. On the 5th of August, 1893, the city, after proper proceedings, ordered the street to be graded to the newly-established

*See notes at end of case.

grade, and awarded the contract for the work to one Goodbody, who entered upon the work in January, 1894, and raised the street to the grade so established. It is alleged that thereby the said block of plaintiff was damaged to the extent of $3,000. In the second count or statement of a cause of action, plaintiff avers ownership of the half of block 228, which fronts on Fifth street, and is on the east side of Fifth street, opposite block 227. By allegations in every way similar to these already noticed, it is averred that this property has suffered damage to the extent of $2,500. For a defense the defendant denied that plaintiff has been damaged, but avers that by the said grading the property of plaintiff was benefited and greatly enhanced in value. For a special defense it is averred that the plaintiff's claim for damages was not presented to the common council, nor filed with the city clerk, within six months after the occurrences from which her damages are alleged to have arisen. It is also alleged that plaintiff's claim is barred by subdivision 1 of section 339 of the Code of Civil Procedure. In general, the court found the facts to be as alleged in the complaint, and assessed the damages under the first cause of action at $486.75, and under the second cause of action at $364.50. There was a finding, however, as to each cause of action, that the claim for damages was not presented to the common council, nor filed with the city clerk, within six months after the occurrences from which said damages are alleged to have arisen. In fact, as shown by the evidence, neither claim was ever presented or filed. The appeal is from the judgment and from the refusal to grant a new trial.

The appellant makes three points: (1) The evidence does not show that plaintiff has been damaged; (2) if plaintiff has suffered damage, the city is not liable; and (3) the claim for damages not having been presented or filed, the suit cannot be maintained.

I think the first point must be sustained, not because there was not testimony that, in the opinion of some of the

witnesses, the property of plaintiff had been damaged by the change of grade, but because it is evident that the witnesses based their estimates upon a mistaken view of the issue to be determined. Although the ordinance changing the grade was passed in 1889, the contract for doing the work of changing the grade was not let until October, 1893, and the work was not completed until January, 1894. But in the summer of 1892 a street-railroad company laid its track along Fifth street, in front of plaintiff's property, and constructed a roadbed 23 feet wide on the new grade. The railroad corporation had a franchise from the city granting them the right to construct and operate their street railway, and requiring them to place all their tracks on the official grade. It was and is claimed by the plaintiff that the city is liable for the injury which resulted from the work done by the street railroad corporation, because it only raised the street to the official grade, as it was required to do in its grant of a franchise. The witnesses for the plaintiff evidently estimated the damages by comparing the value of the property before the street was interfered with by the railroad company, with its value after the grading was finished by the city, as though the city had done all the work of grading and was responsible, and could be held in this action for the change made by the railroad company.

Streets—Change of Grade—Street Railway—Damages—Liability of City.

Conceding for the moment that the city could be held for damages resulting from the construction of the street railroad, plaintiff cannot recover for such damage in this action—First, because the right to sue for damages so resulting was barred by the statute of limitations when this action was commenced, and the limitation is pleaded as a defense; and, second, because this action was not brought to recover such damage. The action is expressly based upon the alteration in the street made by the city, through its contractor, D. J. Goodbody. For the damages caused by the work previously done by the railroad company, if any, the plaintiff had a right of

action against that company, and, if the city was also liable, against the city, as soon as the work was done. Such damages could not have been proven in this case, in the face of the plea of the statute. The witnesses should then have been questioned as to the difference between the value of plaintiff's property as it existed when Goodbody commenced work; that is, with the roadbed made by the street-railroad company upon the street. Plaintiff's witnesses do not seem to have been questioned as to the damages upon any such state of facts. But I do not concede that the city would have been liable, if the suit had been brought in time, for the injury to plaintiff's land resulting from the work done by the railroad company. This court held in Eachus *v.* Railway Co., 103 Cal. 614, 37 Pac. 750, that the city is not made liable by the ordinance establishing the grade; also, that a street-railroad company which does the work in order that it may lay its track upon the official grade, as required by its franchise, is liable to the lot owner for such damage.

Two different theories upon the subject seem to find favor with the courts, as indicated by the authorities cited by respondent. In Missouri (Sheehy *v.* Railroad Co., 94 Mo. 574, S. W. 579) it seems to have been held that both the city and the private corporation were liable for such damage, and it was said that the company "takes the privilege yoked with a liability." On the other hand, it was held in Railway Co. *v.* Early, 46 Kan. 197, 26 Pac. 422, that the city only was liable for work done by the private corporation under such circumstances. It was said of the private corporation: "It holds a position, as it were, of a contractor for the city. * * * The railway company ought not to be held liable because the city failed to grade the street to its full width at the time the company constructed and put in operation its railway." If the private corporation is a contractor or the agent of the city in doing the work, there is no logical objection to the conclusion reached by the Kansas court. And there is much plausibility in the position. The damage does not result from an unlawful act. The necessity of doing

the work on the part of the railway company is created by the condition of their franchise, and this also is its warrant for doing the work. But, for this its acts in the matter would be unlawful, and the company liable as a trespasser. The damages are the consequence attached by the constitution and laws to the performance of a lawful act by which private property is burdened with a public use. Formerly, loss so occasioned did not give rise to an action. It was said to be *damnum absque injuria*. This burden is not put upon private property by the railway company, but by the city. The private company can be held only upon the idea that the franchise is granted upon the condition that, when it becomes necessary for the company to raise or lower a street to place its track upon the official grade, it assumes the liability. "It takes the privilege yoked with the liability." This is, I think, the true theory, and is fair and just to all parties. As said in Eachus *v.* Railway Co., no liability on the part of the city is created by the ordinance establishing the grade. Ordinarily, the grade must be established at the same time over many streets, in order that they may be so related to each other as to permit drainage. A system must be established throughout a district. It does not follow, however, that all the streets must be actually graded at once, and the municipality does not thereby undertake that they ever will be actually graded. When, therefore, a street railway company, for its own pecuniary advantage, lays its track upon streets which the city is not prepared to grade, and perhaps will never have occasion to construct, it is but just that the railway should assume the liability for such work, and it was so held in Eachus *v.* Railway Co., although the question was not there directly involved.

Same—Same—Same—Same—Same.

I see no reason for holding that the railway is in any sense the agent of the city in the work. The grant of the franchise did not impose upon the company the duty of cutting down or filling up a street. It may do so or not, as its interests prompt. And, when

Same—Same—Agency.

it changes the grade for its own purposes, it must necessarily be at a point where the city has not found it necessary to construct the street or actually change the grade, and has not in the statutory mode declared its intention of doing the work. In the present case the railway company did not construct a street, but, on the contrary, it ruined the street which had been already made. It disregarded the interests of the city altogether, constructing only its railway for its own purposes, and to make a profit for its stockholders.

The second point made is that the city is not responsible for damages, even for those resulting from its own work in changing the grade. The street is in Horton's addition to the city of San Diego. Horton, owning the tract of land, caused it to be laid out in blocks and streets, and sold it in lots according to a map made by him. It is contended that the dedication of the streets implied the right to construct a roadway over them. Otherwise, such a dedication would be equivalent to saying, "I give you these strips of land for streets, but I will sue you for damages if you make that use of them;" for it might be necessary to grade the streets before they could be so used. Such a dedication might prove a Greek gift, more costly than any purchase. The question has been variously decided, and is somewhat discussed in Eachus *v.* Railway Co. It is only material here in case of a new trial.

Charter Provisions—Presentation of Claim.

As we have seen, the plaintiff's claim was never presented to the city council for allowance, nor filed with the clerk or with the secretary of the auditing committee. Upon this subject the charter contains the following provisions: Every officer authorized to audit and certify demands may administer oaths to witnesses, and hear testimony in regard to any matter connected with the claim. St. 1889, p. 726. Section 10, c. 2 art. 2, of the charter (St. 1889, p. 658), reads as follows: "All claims for damages against the city must be presented to the common council and filed with the clerk within six months after the occurrence from which the damages arose."

In addition to these provisions, the charter creates an auditing committee, who shall examine, allow, and order paid, or reject and disallow, all bills and claims, of whatever nature (except salaries), and requires all claims and demands (except salaries) to be verified and filed with the auditing committee, whose duty it is made to allow or reject the same in whole or in part. St. 1889, p. 704. The contention of respondent is that the word "audit" is not applicable to a demand for damages arising from a tort; that the committee can only determine whether the claim has already been allowed by the council, or is a demand fixed by law which is payable without being so allowed, or, at the most, a demand arising upon a contract made by the city, in which the amount has been fixed, and where performance may be shown by vouchers. Many authorities are cited in support of this position. But, like other statutes, each charter must be construed by its own terms. This charter expressly requires all claims for damages to be presented within six months, not to an auditor or auditing committee, but to the legislative body of the city. Coupled with the other provisions which expressly require the presentation of all claims and demands, and authorize the auditing committee to take testimony, and upon that to reject or allow, there can be no doubt as to the policy adopted in this charter.

But it is argued the charter does not say that no action shall be brought unless the claim is so presented, nor is there a limitation as to the right to sue. To hold that the city may be sued upon such demand after the expiration of six months, and without having presented the same, would be to hold that, notwithstanding the charter, such demand need not be presented. I can imagine no motive for the requirement unless a failure to so present the demand is fatal. If the law had read, "Claims must be presented within six months, but a failure to so present them shall not affect their validity," we should have been at a loss to understand the purpose of the law. It would have been a self-professed absurdity. I think the implication that a failure to present

a claim is fatal to it is as plain as would have been an express declaration to that effect.

It is then said that the point was not raised in appellant's points. This is a mistake. The point is raised, but, through carelessness or for some other reason, appellant's counsel cited the wrong provision of the charter in support of it. This error of citation was not corrected until the reply brief was filed. The answer distinctly makes the point, pleading the objection that the demand had not been presented to the city council or filed with the clerk. The attorneys who drew the answer had certainly read the charter. The attorneys who filed the points and authorities overlooked this most essential requirement, but made the point distinctly, though relying upon a section which, if standing alone, would have left the question in some doubt. It is not, however, a new point, raised for the first time after the points and authorities were filed. The judgment and order are reversed, and the cause remanded.

Same—Citation—Mistake of Counsel.

We concur: HENSHAW, J.; GAROUTTE, J.; HARRISON, J.

VAN FLEET, J. I concur in the judgment, upon the last ground stated in the opinion.

NOTES.

Action Against Municipal Corporation—Presentation of Claim.—It is frequently provided by State legislation in order to prevent unnecessary litigation, that before an action can be maintained against a municipal corporation upon any claim, such claim must be presented within a certain time to the proper authorities for allowance. Brehm *v.* Mayor, etc., of N. Y., 104 N. Y. 186; Russell *v.* Mayor, etc., of N. Y., 1 Daly (N. Y.) 263; Miller *v.* Buffalo, 1 Buff. (N. Y.) Super. Ct. 490; Oxford Bank *v.* Wheeler, 72 N. Y. 201; McGaffin *v.* Cohoes, 74 N. Y. 387, 30 Am. Rep. 307; Cooke *v.* Saratoga Springs, 23 Hun (N. Y.) 55; People *v.* Board of Apportionment, 52 N. Y. 224; People *v.* Green, 64 Barb. (N. Y.) 164; Bulwinkle *v.* Guttenburg, 17 Wis. 585; Kelley *v.* Madison, 43 Wis. 638; Schriber *v.* Town of Richmond, 73 Wis. 5, 24 Am. & Eng. Corp. Cas. 591; Herman *v.* Crete, 9 Neb. 350; Richardson Co. *v.* Hull, 24 Neb. 536, 24 Am. & Eng. Corp. Cas.

Notes

600; Hastings *v.* Thorne, 8 Neb. 160; White *v.* Lincoln, 5 Neb. 505; State *v.* Cathers, 25 Neb. 250; People *v.* Township Board of Lincoln, 41 Mich. 415; Royster *v.* Granville Co., 98 N. Car. 148, 22 Am & Eng. Corp. Cas. 249; Grayson *v.* Latham, 84 Ala. 546, 22 Am. & Eng. Corp. Cas. 279; Maxwell *v.* Fulton Co., 119 Ind. 20, 24 Am. & Eng. Corp. Cas. 584.

Where a statute made it the duty of school directors "to audit all claims against the school district, and to draw orders on the clerk for the same," the latter being also made treasurer of the district's funds—*held*, that all claims against the district must be presented for audit before suit could be maintained on them. Stackpole *v.* School District No. 5, 9 Oreg. 508.

But one having a tort claim against West Troy is not required by N. Y. laws 1859, ch. 262, to present it against the fiscal officer before bringing an action thereon. Childs *v.* West Troy, 23 Hun (N. Y.) 68.

Such requirements are perfectly valid. They do not affect the jurisdiction of federal courts, nor do they deal with subjects beyond the legislative control of the State. May *v.* Jackson Co., 35 Fed. Rep. 710.

They are not unconstitutional because they vest in certain boards or officers the power to adjudicate upon the claims against the municipality. Maxwell *v.* Fulton Co., 119 Ind. 20, 24 Am. & Eng. Corp. Cas. 584.

An act of the legislature, ordering city supervisors to audit and allow a certain named claim already established by a judgment, is not the judicial establishment of a claim, but a regulation as to the payment of a claim already judicially established, and is therefore constitutional. People *v.* San Francisco, 11 Cal. 206.

Where such statutes are in force the requirements that the claim be presented constitutes a condition precedent. Reining *v.* Buffalo, 102 N. Y. 308; Thompson *v.* Milwaukee, 69 Wis. 492; Ames *v.* San Francisco, 76 Cal. 325.

It is an essential preliminary to the collection of the claim. Youngsville *v.* Siggins, 110 Pa. St. 291. Demand on treasury for officer's salary must be presented. Paxson *v.* Holt, 40 Cal. 466.

And the complaint must allege a proper presentation. Reining *v.* Buffalo, 102 N. Y. 308; overruling Nagel *v.* Buffalo, 34 Hun (N. Y.) 1; Miller *v.* Buffalo, 1 Buff. (N. Y.) Super. Ct. 490; Thompson *v.* Milwaukee, 69 Wis. 492.

A city charter provided that a disallowance of a claim by the common council should be "final and conclusive, and a perpetual bar to an action," unless an appeal should be taken within a certain time.

Held, that the complaint in an action on a claim should show the existence of the right to sue. Watson *v.* Appleton, 62 Wis. 267.

Proper Presentation.—Under a charter requiring that all claims against the city for injuries shall be presented to the comptroller, duly verified, it is sufficient, in the absence of objection, if the original claim, signed and verified, is shown to the comptroller, and a copy left with him. Magee *v.* Troy, 48 Hun (N. Y.) 383. And see, as to what constitutes a proper presentation, Babcock *v.* New York, 9 N. Y. Suppl. 368.

CITY OF LOUISVILLE

v.

HEGAN *et al.*

(*Court of Appeals of Kentucky, Feb. 23, 1899.*)

Streets—Changing Grade—Injury to Abutting Property—Liability of City.*—Where the street grade is lowered in front of abutting property, and such property is specially damaged thereby, the owner may recover of the city.

Measure of Damages.—The measure of damages in such a case is the difference between the market value of the property immediately before it become known that the grade would be lowered and its market value just after the grade was lowered.

Limitations—Constitutionality of Statute.—The statute providing that actions against cities of the first class, for damages for injuries to person or property, shall be begun within six months after the cause of action accrues is unconstitutional.

APPEAL from Jefferson county circuit court. *Affirmed.*

H. L. Stone, for appellant.

Phelps & Thum, for appellees.

PAYNTER, J. The appellees own a house and lot on Catalpa street, in Parkland, in the city of Louisville. The house was built with reference to the grade of the street as originally constructed. In lowering the grade of the street four or five feet, it is claimed that

Case Stated.

*See Ehrsam *v.* City of Utica (N. Y.), *ante*, p. 70, and *notes*, p. 73 *et seq.*

their property was greatly damaged, and this action was brought to recover damages resulting from the action of the city in thus lowering the grade of the street. It is unnecessary to state specifically the condition in which the lot was left when the work was completed.

Two of the instructions which the court gave the jury read as follows: "(2) But, in making the grade of said street, the city had no right to injure the value of the plaintiff's property, if it did so injure it, without making her compensation therefor; and if the jury shall believe from the evidence that the said property was injured or diminished materially in value by the city excavating Catalpa street to its present grade, and that plaintiff was thereby damaged more than the general public, then the law is for the plaintiffs, and the jury should find for them in such an amount as fairly represents the amount in which the market value of said property was thereby diminished, if its value was so diminished, not exceeding the sum of $1,000, the amount claimed in the petition. Given. Emmet Field. (3) If the jury find for the plaintiffs, they should ascertain from the evidence the market value of the said property just before it became known that the city would lower the grade of Catalpa street, and its market value after the street was made, and award the difference in said values, if any there is, to plaintiffs, not exceeding the amount claimed in the petition. If they find for the defendant, they will say so, and no more. Given. Emmet Field."

Counsel for the appellant insists that, under the law as it existed before the adoption of the present constitution, the instructions would have been erroneous, and that section 242 of that instrument has not changed the law. This court, in City of Henderson *v.* McClain, 43 S. W. 700, has adjudged otherwise, and held that the owner of property abutting upon a public street in a city may recover of the municipality damages for injury sustained by reason of the excavation of the street in front of the property for the purpose of grading it.

Streets—Changing Grade—Injury to Abutting Property—Liability of City.

We think the instruction fixing the measure of damage was proper. Taking the two instructions together, which appear above, the jury could only have taken into consideration the diminution in value resulting from the lowering of the grade of the street.

Measure of Damages.

The city relied upon the statute of limitation as a defense to the action. Section 2752, Ky. St., provides that actions against cities of the first class, for damages for injuries to person or property, shall be begun within six months after the cause of action accrues. All that is necessary to say upon this question is that this court in City of Louisville *v.* Kuntz, 47 S. W. 592, held the statute in question to be unconstitutional. The judgment is affirmed.

Limitations—Constitutionality of Statute.

CITY OF CHICAGO

v.

MANHATTAN CEMENT CO.

(*Supreme Court of Illinois, Feb. 17, 1899.*)

Constitutionality of Statute Making City Liable for Damage by Mobs.*—The act making a city or county liable to an action by or in behalf of a party whose property has been destroyed or injured in consequence of a mob or riot is a police regulation, and constitutional.

Same.—Whether or not a city made defendant to such an action is indebted beyond the constitutional limit is immaterial in determining the constitutionality of the act, as it does not create a debt against the defendant city within the meaning of the constitutional provision.

Same.—And the fact that a city or county may be liable under such statute without any fault or neglect of duty on its part is also immaterial in this connection.

APPEAL by defendant from Cook county circuit court. *Affirmed.*

*See note at end of case.

City of Chicago *v.* Mauhattan Cement Co

Charles S. Thornton, Corp. Counsel, and *Thomas J. Sutherland*, for appellant.

Geo. Willard (*J. J. Brooks* and *C. V. Gwin*, of counsel), for appellee.

WILKIN, J. Appellee brought its action on the case, in the circuit court of Cook county, against the city of Chicago, to recover three-fourths of the value of a quantity of cement alleged to have been destroyed in consequence of a mob or riot in the city July 6, 1894. By agreement of parties, a jury was waived, and both matters of law and fact were tried by the court. The finding being for the plaintiff, judgment was rendered in its favor for $150 and costs of the suit. The city prosecutes this appeal. Case Stated.

The action is based upon the statute entitled "An act to indemnify the owners of property for damages occasioned by mobs and riots," in force July 1, 1887. Laws 1887, p. 237. The first section of that act provides "that whenever any building, or other real or personal property except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in the city then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof." Section 2 authorizes the bringing of a suit in any appropriate form of action, and provides that "whenever any final judgment shall be secured against any such city or county in any such action, the same shall be paid in due course, as in case of other judgments." By section 3 no recovery can be had if the loss is the result of the carelessness, neglect, or wrongful act of the plaintiff, nor unless such party shall have used all reasonable diligence to prevent the loss. Section 4 preserves the right of action against the parties engaged in the mob or riot, or in any manner participating in the same, and gives the city or county paying the damages a lien upon any judgment so obtained against such individual. Section 5 gives the city or county

an action over against any person or persons engaged or in any manner participating in the mob or riot. By section 6 no action shall be maintained under the act unless notice of the claim shall have been given within 30 days, and the action brought within 12 months after the loss or damage occurred.

Plaintiff, by its declaration, alleged all the facts made necessary by these several sections to entitle it to recover. The trial was upon a stipulation of facts between the parties, by which the defendant agreed that all the facts alleged in the declaration were true, and the plaintiff, on its part, admitted that at the time of the destruction of the property the city was indebted beyond the constitutional limit of 5 per centum on the value of its taxable property, and could lawfully obtain no funds for employing more firemen or policemen, or which could be expended for the purpose of protecting the plaintiff's property; that the funds which it had or could obtain were expended for the necessary running expenses of the city government, including the maintenance of the police and fire departments; also that, at the time of the destruction of the property, marshals appointed by the circuit court of the United States, and soldiers of the regular army and state militia, were present, engaged in protecting all public and private property within the city; that the city has now, and had at the time of the destruction of said property, no funds which, under the constitution and laws of the state, can be used to pay a judgment in the action, if one should be rendered against it.

The only question at issue upon the trial was the constitutionality of the statute declared upon, and the court, in its rulings upon propositions of law submitted by counsel for the respective parties, decided in favor of the validity of the act. The correctness of that ruling is the only point presented for our decision.

Constitutionality of Statute Making City Liable for Damage by Mobs.

Statutes similar to ours have been in force in England, as well as in several of the states in this country, for many

years, and have uniformly been upheld by the courts. The constitutional right of legislatures to enact such laws, under our form of government, has been frequently challenged in courts of last resort, and our attention is called to no case denying that authority. The principle upon which these laws are held to be within the general scope of legislative power is stated in Allegheny Co. *v.* Gibson, 90 Pa. St. 397, as follows: Speaking of the course of the ancient English law of the subject, it is said: "Formerly, as we have seen, a person robbed had his remedy against any inhabitant of the hundred; that is to say, the inhabitants were jointly and severally liable. Then the law was so changed that damages recovered against an individual could be assessed against all the inhabitants, so as to compel contribution. Afterwards it was still further modified so as to give the right of action against the hundred. The principle upon which this legislation rested was that every political subdivision of the state should be responsible for the public peace and the preservation of private property, and that this end could be best subserved by making each individual member of the community surety for the good behavior of his neighbor and for that of each stranger temporarily sojourning among them. The effect was to make each citizen a detective, and on the alert to prevent, as well as to detect and punish crime. * * * It was evidently a police regulation, based upon grounds of public policy, and in force without regard to the hardships of particular cases." And referring to the Pennsylvania act, which is very similar to that under consideration, it is further said: "Our act of 1841 is also a police regulation, and rests upon like grounds of public policy. Under our political system, the state grants a portion of its sovereignty to certain municipalities. It clothes them with certain of its powers, and exacts from them, in return, the performance of certain duties. Among the powers granted is that of maintaining a police force. Among the duties exacted is that of preserving the public peace. There is an

implied contract between the state and every municipality upon which it bestows a portion of its sovereignty that such municipality shall preserve the public peace and maintain good order within its borders. The state lends its aid when the local authorities are overborne and a call for assistance is made in the manner pointed out by law. But it is entirely within the power of the sovereign to make such communities responsible for the preservation of order. The privileges conferred must be taken with such burdens as the lawmaking power chooses to annex thereto."

In Darlington *v.* City of New York, 31 N. Y. 164, the court of appeals, having under consideration the statute of that state, passed in 1855, making counties and cities liable for property destroyed in consequence of mobs, said: "It cannot be doubted but that the general purposes of the law are within the scope of legislative authority. The legislature has plenary power in respect to all subjects of civil government which they are not prohibited from exercising by the constitution of the United States or by some provision or arrangement of the constitution of this state. This act proposes to subject the people of the several local divisions of the state, consisting of counties and cities, to the payment of damages to property in consequence of any riot or mob within the county or city. The policy upon which the act is framed may be supposed to be to make good at the public expense the losses of those who may be so unfortunate as, without their own fault, to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent; and further, and principally, we may suppose, to make it the interest of every person liable to contribute to the public expense to discourage lawlessness and violence, and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government, and, indeed, it is to maintain them that governments are instituted, and the means provided by this act seem to be reasonably adapted to the purposes in view."

Except that of the state of Maryland, all of the statutes of this character, so far as we can ascertain, like our own, fix the liability of the municipality without reference to its ability or exercise of diligence to prevent the destruction, and that feature has not been considered, by any of the courts passing upon the question, as an objection to their validity. In Allegheny Co. *v.* Gibson, *supra*, it was said; "It may seem a harsh rule to hold a community responsible for the effects of mob violence, which, apparently, at least, they had no power to prevent, yet not more so than to hold every inhabitant of the English hundred liable for a robbery of which he knew nothing and had no means of arresting. In both cases, it is a police regulation. It is based upon the theory, that, with proper vigilance, the act might and ought to have been prevented." The following authorities either directly pass upon and sustain like statutes, or recognize their validity and give force to them: 2 Dill. Mun. Corp. § 959; Davidson *v.* City of New York, 27 How. Prac. 342; Luke *v.* City of Brooklyn, 43 Barb. 54; *In re* Pennsylvania Hall, 5 Pa. St. 204; Underhill *v.* City of Manchester, 43 N. H. 214; Williams *v.* City of New Orleans, 23 La. Ann. 507; Chadbourne *v.* Town of Newcastle, 48 N. H. 196; City of Atchison *v.* Twine, 9 Kan. 350; Brightman *v.* Inhabitants of Bristol, 65 Me. 426; Clear Lake Water-Works Co. *v.* Lake Co., 45 Cal. 90.

In Marion Co. *v.* Lear, 108 Ill. 343, the question being as to the constitutionality of the statute requiring counties to pay sheriffs' fees in criminal cases where the defendants are acquitted, and to make up any deficiency in their salaries, we said, after holding that the passage of the law was an exercise of the police power (page 349): "Whether the burden of enforcing police regulations, in the absence of express constitutional restriction,—and none such is here claimed,—shall be borne by the state at large or be devolved upon the local municipality is a mere question of public policy, upon which the determination of the general assembly is conclusive. A county is a public corporation, which exists only for

public purposes connected with the administration of the state government, and it and its revenues are alike, where no express constitutional restriction is found to the contrary, subject to legislative control." See, also, Harris *v.* Board, 105 Ill. 445.

But counsel for the city assert that in none of the authorities cited as upholding the constitutionality of these mob or riot statutes were constitutional provisions in force like those contained in our constitution of 1870. It is not and cannot be denied that the legislature of this state has full power to enact all laws pertaining to the civil government of the state, not prohibited by the federal or state constitutions. The constitution itself confers that power, and, as said in Association *v.* Lounsbury, 21 Ill. 511 (speaking of the constitution of 1848, similar in that regard to our present constitution): "The general grant of legislative power found in the constitution confers upon the general assembly all legislative power, and authorizes the lawmakers to pass any laws and do any acts which are embraced in the broad and general word 'legislation,' as known and defined in the English language," etc. "The question of legislative power, and its extent, depends on the limitations contained in the constitution. When a state is created it is vested with complete sovereign power, unless restricted by constitutional limitation. By section 1, art. 4, of our constitution, full, unlimited, and uncontrolled legislative power is conferred and may be exercised, unless limited by other provisions of that instrument or by the federal constitution." Harris *v.* Board, *supra*.

It is not claimed that the statute in question is in any way violative of the constitution of the United States. The question, then, must be, has the city, by its counsel, succeeded in pointing out any provision of the constitution of this state which restricts, limits, or prohibits the enactment of this law? The attempt to do so is by setting up the following sections of article 9, and the separate section prohibiting donations by municipal corporations to private corporations. These sections are as follows:

"Sec. 9. The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. For all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

"Sec. 10. The general assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. Private property shall not be liable to be taken or sold for the payment of the corporate debts of a municipal corporation."

"Sec. 12. No county, city, township, school district or other municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness."

Separate section: "No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation or make donation to or loan its credit in aid of such corporation."

Counsel for the city say in their argument (meaning, no doubt, sections 9 and 10): "These sections prohibit any increase of indebtedness of cities, direct or indirect, present, future, or contingent, by or through any subsequent legislation, and, to be specific, prohibit any legislation which shall directly impose a debt, or create a condition of affairs which shall be likely to produce a debt,—thus prohibiting the legislature from accomplishing the result by indirect

methods which it is in terms prohibited from doing by direct provisions. In other words, the legislature is prohibited by these sections of the constitution from enacting any law which shall, in and of itself, provide or create a present debt, or put into existence or motion any condition of affairs which will render it possible or probable that a municipal debt may thereby be created; such a law being in contravention alike both of the terms and of the spirit of the constitution." If this proposition had been limited to indebtedness for "local or corporate purposes," within the proper meaning of the term, it might, at least for the purposes of this decision, be conceded. In Marshall *v.* Silliman, 61 Ill. 218, the question "whether the legislature can create a debt against a municipal corporation for municipal purposes, and subject it to a tax for its payment, without its consent," was disposed of in the following language: "Our new constitution expressly prohibits this for the future, and the decisions of this court substantially hold that it could not be done under the constitution of 1848,"—citing and quoting from Harward *v.* Drainage Co., 51 Ill. 130; People *v.* Mayor of Chicago, Id. 17; Hessler *v.* Drainage Com'rs, 53 Ill. 105; and Lovingston *v.* Wider, Id. 302. The cases of Cairo & St. L. R. Co. *v.* City of Sparta, 77 Ill. 505, Updike *v.* Wright, 81 Ill.49, and Choisser *v.* People, 140 Ill. 21, 29 N. E. 546, simply follow the preceding cases in holding that debts for merely corporate purposes cannot be created against municipal corporations by the legislature, under our constitution, without their consent.

If it should be admitted that this act does create debts and impose taxes for their payment upon cities and counties without their consent,—a proposition, in our opinion, untenable,—still, unless it can be further successfully maintained that such debts are for local purposes,—merely and only for corporate purposes,—the foregoing sections of the constitution, as heretofore construed, do not prohibit or limit the power of the legislature to enact the statute. In People *v.* Mayor of Chicago, *supra*, CHIEF JUSTICE BREESE, construing

section 5 of article 9 of the constitution of 1848, and referring to Harward *v.* Drainage Co., *supra*, said (page 30): "To what extent it is to be construed as a limitation upon the power of local taxation, directly by the legislature itself, it was not necessary in that case, nor is it in this, to decide. However strong the argument in favor of so construing it, there nevertheless may be cases where the legislature, without the consent of the corporate authorities, might impose taxes local in their character, if required by the general good goverment of the state, because such taxes would not be merely and only for corporate purposes; as, if one of the cities of the state should be insurgent, requiring the interposition of the military power, it will not be denied the state, on quelling the insurrection, could impose taxes upon the city to defray the expense of a resort to military power. So, if the police department of a city should fail to furnish reasonable security to life and property, the state undoubtedly might provide such force and assess the city for the expense; but the tax authorized by the act it question is for a purpose purely local and corporate, having no other element about it, and the commissioners appointed by it are in no sense corporate authorities of the city of Chicago." This language clearly indicates that it was not intended, by any of the decisions cited, to hold that the legislature might not create a debt against cities or counties, and provide for the collection of the same, where it was done under a proper exercise of the police power, and hence they are in no way in conflict with what was decided in 108 Ill. and 105 Ill., *supra*.

In his work on Taxation, treating of the subject of local taxation under legislative compulsion, JUDGE COOLEY, enumerating the cases in which such taxes are lawful, says (page 686): "Mobs and Riots. Another similar case is where a municipal corporation is compelled, by means of taxation, to make compensation for losses sustained within its limits at the hands of mobs and rioters. It has been thought from very early times that that political division of the county which failed to exert its authority for the effectual

suppression of disorder, by means whereof innocent parties suffer from lawlessness and violence within its boundaries, might justly be required to make good the losses, and that its diligence in maintaining the empire of the laws would be quickened by the requirement. Such legislation is, in effect, only a part of the state police system, under which the municipal divisions are severally looked to for the preservation of the public peace within their respective limits. And, speaking generally, it may be affirmed that in any case in which compulsory taxation is found necessary in order to compel a municipal corporation or political division of the state to perform properly and justly any of its duties as an agency in the state government, or to fulfill any obligation, legal or equitable, resting upon it, in consequence of any corporate action, the state has ample power to direct and levy such compulsory taxation, and people to be taxed have no absolute right to a voice in determining whether it shall be levied, except as they may be heard through their representatives in the legislature of the state." The same author says, in his work on Constitutional Limitations (page 283): "The legislature has undoubted power to compel the municipal bodies to perform their functions as local governments, under their charters, and to recognize, meet, and discharge the duties and obligations properly resting upon them as such, whether they be legal, or merely equitable or moral, and for this purpose it may require them to exercise the power of taxation whenever and wherever it may be deemed necessary or expedient."

Keeping in mind that the passage of this and similar laws is for the better government of the state,—is a mere police regulation,—sections 9 and 10 of the constitution in no way limit the power of the general assembly to enact them. There is still less reason for the contention that section 12, *supra*, is such a limitation. By no possible construction can it be held to create a debt against municipal corporations of any particular amount, much less of an amount exceeding the constitutional limit. We certainly cannot be asked to

assume that every county and city in the state would be compelled to become indebted, by its enforcement, to an amount, including existing indebtedness, exceeding 5 per centum on the value of its taxable property, in order to justify a holding against the validity of the act. Whether or not the city of Chicago was at the bringing of this suit, indebted beyond that amount, is wholly immaterial in determining the constitutionality of the law. That question could only arise, if at all, upon a proceeding to collect the judgment.

Same.

But aside from the foregoing considerations, as already intimated, we do not think the act, in any proper sense, creates a debt against cities and counties. It does no more than provide that, under certain circumstances, they shall be liable to owners for property destroyed by mobs and riots. Owners seeking to recover for such loss must, as in any other case, make out their cause of action by alleging and proving all the facts prescribed by the several sections of the act. This right of action is no more a debt against a city or a county than is the right of recovery against such municipality for any other wrong or injury. The New York constitution provided that on the final passage, in either house of the legislature, of every act which imposes, continues, or revives a tax, etc., three-fifths of all the members should be necessary to constitute a quorum. In Darlington *v.* City of New York, *supra*, it was insisted the mob act of that state imposed a tax, and that the constitutional quorum was not present when it passed. DENIO, C. J., rendering the opinion of the court, said: "The act of 1855 does not impose a tax of any kind, either state or municipal. Its provisions may, and doubtless will, lead to the necessity of local taxation; and the same thing may be said of every act of legislation under which an expenditure for general or local purposes may, in any contingency, be required. If a local tax in a city or village is within the scope of the section, it will be sufficient to have the requisite quorum present when the tax shall come to be voted. The act does not create a

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debt or claim. If no person should suffer damage by riot or mob, no money would be required, and no debt or charge would ever be created, and until such an event shall occur no debt or claim will be called into existence." Under the Illinois statute, there must not only be a loss by mob or riot, but the owner must have been free from fault, and given the required notice, etc., before money can be required or a debt or charge created. What has been said disposes of the contention that the act violates the separate section quoted above. The statute does not make, or provide for making, a donation to any one.

Same.

Neither the wisdom of this law, nor the hardships which it may impose upon municipalities without any fault or neglect of duty upon their part, are matters for discussion or decision in passing upon its constitutionality. These are questions for the legislature, and not for the courts. The oft repeated rule is "that, to render a statute unconstitutional, it must be clearly violative of the plain provisions of the constitution. All doubts and uncertainties, arising either from the language of the constitution or the law, must be resolved in favor of the validity of the statute. Every intendment is in favor of the constitutionality of enactments of the legislature." After giving the question here involved the careful consideration its importance deserves, we are of opinion that no sufficient reason is shown for holding the act in question unconstitutional. The judgment of the circuit court will accordingly be affirmed. Judgment affirmed.

NOTE.

Liability of Municipality for Destruction of Property by Mob.—There is no common law liability on the part of a municipality for injury done to property by a riotous mob or assemblage of persons. Western College *v.* Cleveland, 12 Ohio St. 375; Cheaney *v.* Hooser, 9 B. Monr. 330; Prather *v.* Lexington, 13 B. Monr. 559; Ward *v.* Louisville, 16 B. Monr. 184; Baltimore *v.* Poultney, 25 Md. 107; Duffy *v.* Baltimore, Taney's Dec. 200; *In re* Pennsylvania Hall, 5 Pa. St. 204; Howe *v.* New Orleans, 12 La. Ann. 481; Williams *v.* New Orleans,

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23 La. Ann. 507; Hagerstown *v.* Dechert, 32 Md. 369; Dale Co. *v.* Gunter, 46 Ala. 118; Chadbourne *v.* New Castle, 48 N. H. 196; Underhill *v.* Manchester, 45 N. H. 213; Martin *v.* Mayor, etc., of Brooklyn, 1 Hill 545; Bailey *v.* Mayor, etc., 3 Hill, 531; Ely *v.* Supervisors, 36 N. Y. 297; Newberry *v.* New York, 1 Sweeny, 369; Moody *v.* Niagara Co. 46 Barb. 659; Buttrick *v.* Lowell, 1 Allen 172; Street *v.* New Orleans, 32 La. Ann. 577.

Such a liability, may,however,be constitutionally imposed by statute. Lowell *v.* Wyman, 12 Cush. 273; Russell *v.* Mayor of New York, 2 Denio, 461; Gray *v.* Brooklyn, 10 Abb. Pr. (N. S.) 186; Campbell *v.* Montgomery, 53 Ala. 527; Darlington *v.* Mayor, etc., of New York, 31 N. Y. 164; *In re* Pennsylvania Hall, 5 Pa. St. 204; Atchison *v.* Twing, 9 Kan. 350; Underhill *v.* Manchester, 45 N. H. 214; Brightman *v.* Bristol, 65 Me. 426; Allegheny Co. *v.* Gibson, 90 Pa. St. 397; Clear Lake W. W. Co., 45 Cal. 90; Solomon *v.* Kingston, 24 Hun, 562.

STATE (FREVERT *et al.*, PROSECUTORS)

v.

MAYOR, ETC., OF CITY OF BAYONNE.

(*Supreme Court of New Jersey, Feb. 27, 1899.*)

Municipal Improvements—Assessments Exceeding Benefits.*—The fair cost of a public improvement is not neccesarily the measure of benefit to the property benefited thereby. If the cost exceeds the special benefits, the public must bear the excess as a general benefit.

Same—Disproportionate Assessments.—A uniform assessment, arbitrarily imposed by the lot on all property affected in the same way by a public improvement, will not be sustained, if the advantages to the lots vary.

Excessive Assessments—Certiorari.*—An assessment on lands for a public improvement, clearly proved to exceed the benefits thereby conferred on the property, will be set aside on *certiorari*.

Laches.—Laches is not an absolute bar to relief against an assessment for a public improvement, if there is legal provision for a reassessment. The delay in this case, under all the circumstances, *held* not unreasonable.

(Syllabus by the Court.)

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*See notes at end of case.

State *v.* Mayor, etc., of City of Bayonne

CERTIORARI. *Assessment set aside.*

Argued November term, 1898, before LUDLOW and COLLINS, JJ.

Mungo J. Currie, for prosecutors.

James Benny, for defendant.

COLLINS, J. The prosecutors attack the assessments imposed upon their respective lands for the benefits supposed to result from a sewer construction in the city of Bayonne included in one municipal proceeding and contract. This construction was somewhat peculiar. A sewer running eastward to tide water already existed in West Fifty-Second street. How the assessment therefor was distributed was not proved. In the construction now involved, a three-foot brick sewer was built in Avenue D, from West Fifty-Fourth street southward to West Fifty-Second street, a distance of about 500 feet, and there connected with the West Fifty-Second street sewer. This three-foot sewer was intended, eventually, to afford sewerage facilities for quite a large section of the city lying north of West Fifty-Fourth street, and was therefore made larger, and perhaps laid deeper, than would otherwise have been necessary. To connect with it, there was laid an 18-inch pipe sewer in West Fifty-Third street from a point 564 feet west of the center line of Avenue D, and an 18-inch pipe sewer in West Fifty-Fourth street from a point 1,360 feet west of such center line. The formation of the region is of rock, lying quite near the surface. Owing to the size of the trench in Avenue D, the rock excavation was very great, averaging 5.8 cubic yards to the lineal foot. In the two streets the rock excavation averaged about one cubic yard to the lineal foot. The contractor's bid was $7,330 for the sewers and appurtenances complete, with an allowance of $4.50 per cubic yard for necessary rock excavation, which proved to be 4,951 cubic yards. The total cost of the improvement was $34,105.82, of which $29,609.50 went to the contractor, $22,279.50 being for rock excavation, and $4,496.32 went for in-

Case Stated.

cidental expenses. The commissioners assessed upon the property abutting on the sewers, consisting of about 144 city lots of 25x100 feet each, the sum of $29,664.65 for direct present benefits; and upon the property eventually to be drained through this 500 feet of brick sewer on Avenue D, consisting of about 286 separate parcels, not all, however, full city lots, $4,441.17 for prospective benefits. The assessment for direct benefits was $204.75 on each city lot, except as to 12 corner lots, where each assessment was $207.93. The property of the prosecutors is situated as follows: Six city lots are on West Fifty-Fourth street, within the first half of the distance from the beginning point of the pipe in that street; one city lot is on West Fifty-Third street, within the first half of the distance from the beginning point of the pipe in that street; one city lot is on Avenue D, at the beginning of the sewer; and one city lot is on Avenue D, very near the end of the sewer. It will be noticed that the relations of these lots to the rock excavation varies greatly.

It was proved for the prosecutors, and not disputed, that the contested assessments greatly exceed normal impositions, in Bayonne, for affording complete sewerage to tide water. It was also proved, and not disputed that the market value of the lots assessed has not been enhanced anything like the amount of the assessments. But is argued for the city that the extraordinary cost of these particular sewers, due to the unusual rock excavation, makes the case exceptional, and that cost must be taken as the measure of benefit; it not being questioned by the prosecutors that the work was honestly done and the prices paid reasonable. Reliance is had upon the rule laid down by this court, "that the fair cost of an improvement which reasonable men would make for the better enjoyment of their property is a just criterion for determining the benefits received." Hunt *v.* City of Rahway, 39 N. J. Law, 646, affirmed in 40 N. J. Law. 615. But how shall we ascertain that reasonable men would have built these expensive sewers? It is plain that cost may sometimes be so great as to be prohibitory. I know no better standard in a case like

this than the enhancement of market value. The advantage of sewerage facilities is fairly measurable and cannot differ greatly in property of the same general class. The lots affected in this case were cheap lots, in an inexpensive locality. The highest price set by any of the witness for lots on the cross streets before the building of the sewers was $350, and for lots on the avenue $600. I cannot think that a reasonable man would construct a sewer for such property at a cost exceeding $200 a lot. Besides, the prosecutors complain that, by reason of the sewer in Avenue D being laid so large and deep, in order to form part of a main sewer, the laterals have been made larger and deeper than would otherwise have been necessary. To this it was replied that it is too late to object to the size of the sewers. True and doubtless the prosecutors never had standing to make that objection. The construction ordered was part of the city's general plan of sewerage, and a sufficient answer to an individual objector would have been, "You cannot be assessed beyond your benefit." A recent case in this court indicates that a landowner may justly demand that his assessment shall be limited to the fair share of the cost of a sewer adequate to his neighborhood. City of Bayonne *v.* Morris 61 N. J. Law, 127, 38 Atl, 819. While the general rule is that the court is loth to disturb an assessment on an allegation that it is excessive and will never permit the report of the commissioners to be overcome except by proof of very great force, still, when it clearly appears by such proof that the assessment does in fact greatly exceed the benefits received from the improvement, it is the court's duty to set it aside.

Municipal Improvements—Assessments Exceeding Benefits.

It is conceded for the city that these sewers do much more than accommodate the land assessed. They afford combined house sewerage and surface and street drainage. The receiving basins entering into the cost assessed receive street and surface drainage outside of the area assessed. The city has certainly received some general benefit, yet none at all has been assessed. Nor has the great excess of cost to make the Avenue D sec-

tion a main for future laterals been fairly apportioned. I speak, of course, relatively. Doubtless, the assessment per lot for prospective benefit is all that was warranted; but that does not justify making the property directly benefited pay more in proportion. Sewering in cities is often a difficult problem. For sanitary reasons, or to conform to a general plan, it may be necessary to construct sewers that exceed in cost assessable special benefits. The excess must be put to the account of general benefit, and be paid by the city at large. If a sewer improvement is asked for, where there is no such reason for making it, the authorities ought to make sufficient preliminary examination to satisfy themselves that the cost will not exceed the assessable benefits; for to that extent only can the municipality be reimbursed.

In the case in hand, even on the basis of cost, the uniform assessment imposed was not justifiable. The different lots received varying advantage from the removal of rock,—a matter that should have been considered in making assessments. Vreeland *v.* City of Bayonne, 58 N. J. Law, 126, 32 Atl. 68, affirmed in 60 N. J. Law, 168, 37 Atl. 737. I can conceive of no rational rule applicable to this case that could lead to uniform assessments based on the cost of the whole improvement. Uniform assessments, based on enhancement of value, would be intelligible, and so would assessments, within absolute benefits, based on actual proportions of advantage to individual lots; but neither of these rules can be evolved from the result reached by the commissioners.

Same—Disproportionate Assessments.

Though not strictly an estoppel of record, it is, I think, relevant evidence, and was proved in the cause, that this court at November term, 1897, at the suit of Cecilia Detwiller and other prosecutors, set aside, by the consent of the then city authorities, the assessments against their lots for this very improvement, and that new assessments, much lower, have since been made and confirmed. It is argued that there may have been something peculiar in the situation of the property of those prosecutors; but a reference to the report

and maps shows that lots on every part of the improvement, 82 in all, were involved in the case.

It is urged that the present prosecutors are in laches, and should therefore be denied relief. The assessment was confirmed August 20, 1895, but on June 23, 1896, the confirmation was rescinded by a resolution in turn rescinded July 7, 1896. On April 6, 1897, the city council again resolved that the assessment should be reconsidered; but the mayor, on August 19, 1897, vetoed the resolution. Meantime the Detwiller suit was pending. In face of this evident reason to look for relief at home, the prosecutors should not be held to have been supine or indifferent. The new assessment secured by the former prosecutors was only confirmed June 11, 1898. The present writs were allowed October 15, 1898. While unreasonable delay will ordinarily induce this court to refuse its prerogative writ to review an assessment for defects in procedure or alleged excessiveness, and perhaps should always have that effect, where there is no way of subjecting the lands affected to a proper share of the public burden, there seems to be no good reason for denying just relief where there is a power of reassessment, as there is in the case now before us. Bayonne Charter (P. L. 1872, p. 886, § 80). There are precedents for the setting aside of illegal or defective assessments, where there was power of reassessment, although there was laches greater than that in this case, even if we reckon from the original confirmation of the assessment. Graham *v.* Mayor, etc., 37 N. J. Law, 380; Hoxsey *v.* Mayor, etc., *Id.* 409. Upon a reassessment, justice can be done both to the city and the landowner. That, as appears in testimony, some other landowners (about 20 in all) have paid their assessments is immaterial. Nearly all who paid did so in 1895, and no one has paid since March, 1897. No payment has been induced by supposed acquiescence of other landowners. The assessment will be set aside as to the prosecutors, with costs, and new commissioners will be appointed on application.

Laches.

Excessive Assessments—Certiorari.

Notes

Local Assessments—Benefits.—Local assessments must be in proportion to the benefit conferred by the improvement upon the property assessed. Clapp *v.* Hartford, 35 Conn. 66; Springfield *v.* Sale, 127 Ill. 359; Gilmore *v.* Hentig, 33 Kan. 167, 7 Am. & Eng. Corp. Cas. 175; Atchison *v.* Price, 45 Kan. 296, 33 Am. & Eng. Corp. Cas. 130; Wright *v.* Boston, 9 Cush. (Mass.) 233; King *v.* Reed, 43 N. J. L. 186; Schlapfer *v.* Union, 53 N. J. L. 67; *In re* Drainage of Lands, 35 N. J. L. 497; State *v.* Ramsay Co., 29 Minn. 62; *In re* New Orleans Drainage Co., 11 La. Ann. 338; *In re* Canal St., 11 Wend. 555; Chamberlain *v.* Cleveland, 34 Ohio St. 551; Alexander *v.* Baltimore, 5 Gill (Md.), 488; New Jersey R. & T. Co. *v.* Newark, 27 N. J. L. 190; Agens *v.* Newark, 37 N. J. D. 415; Park Ave. Sewers, 169 Pa. St. 433.

Municipal Acts—Review—Certiorari.—In the absence of other remedies, the superior common-law courts will, on *certiorari*, review the proceedings of municipalities, and declare them invalid, if found to be illegal or not in conformity with charter powers. Carroll *v.* Tuskaloosa, 12 Ala. 173; Miller *v.* Jones, 80 Ala. 89, *Ib.* 287; Jackson *v.* People, 9 Mich. 111; Gager *v.* Chippewa Co. Sup., 47 Mich. 167; State *v.* Stewart, 5 Strob. L. (S. C.) 29; State *v.* Swift, 1 Hill (S. C.), 360, *Re* Schmidt, 24 S. C. 363; State *v.* Fort, 24 S. C. 510; Dwight *v.* Springfield, 4 Gray (Mass.), 107; Parks *v.* Boston, 8 Pick. (Mass.) 218; Fay, Petitioner, 15 Pick. (Mass.) 243; Cunningham *v.* Squires, 2 West Va. 422; Taylor *v.* Americus, 39 Ga. 59; Macon *v.* Shaw, 16 Ga. 172; Shaw *v.* Macon, 19 Ga. 468; Burns *v.* La Grange, 17 Tex. 415; Buckner, *In re*, 9 Ark. 73, 148; Camden Treas. *v.* Mulford, 26 N. J. L. 49; Carron *v.* Martin, *Ib.* 594; Morris Canal & B. Co. *v.* Jersey City, 12 N. J. Eq. 252; Holmes *v.* Jersey City, *Ib.* 299; State *v.* Newark, 25 N. J. L. 399; State *v.* Hudson, 32 N. J. L. 365; Swan *v.* Cumberland, 8 Gill (Md.), 150; Dorchester *v.* Wentworth, 31 N. H. 451; Chicago & R. I. R. R. Co. *v.* Whipple, 22 Ill. 105; Ewing *v.* St. Louis, 5 Wall. 413; Kip *v.* Paterson, 26 N. J. L. 298; State *v.* Zeigler, 32 N. J. L. 262; Holberg *v.* Macon, 55 Miss. 112; Miller *v.* Sch. Trustees, 88 Ill. 26; Doolittle *v.* Galena & C. U. R. R. Co., 14 Ill. 381; Sonora H. Com. *v.* Carthage Sup., 27 Ill. 140; Geneseo H. Commr's *v.* Harper, 38 Ill. 103; Tierney *v.* Dodge, 9 Minn. 166; State *v.* Dowling, 50 Mo. 134; St. Paul *v.* Marvin, 16 Minn. 102; Corbett *v.* Duncan, 63 Miss. 84; Loeb *v.* Duncan, 63 Miss. 89; McCreary *v.* Rhodes, 63 Miss. 308; Collins *v.* Davis, 57 Iowa, 256; Stubenrauch *v.* Neyenesch, 54 Iowa, 567; Oshkosh *v.* State, 59 Wis. 425; Board of Ald. of Denver *v.* Darrow (Col.) 22 Pac. Rep. 784.

WESTON

v.

CITY OF SYRACUSE.

(*Court of Appeals of New York, Feb. 28, 1899.*)

Local Improvements—Authority of Common Council to Waive Performance.*—Under the charter of the city of Syracuse all details relating to local improvements are left to the discretion of the common council, and it may waive performance of any of the requirements of the contract or specifications for such improvement without the consent of the owners of abutting property.

Engineer's Certificate.—The engineer's certificate obtained by plaintiff, showing performance of the work according to the original contract as modified by a subsequent resolution of the common council, was sufficient.

Right of Action.*—Where plaintiff has constructed local improvements according to contract, and the city has declared its intention not to be bound by the contract, and has neglected to levy the assessment, plaintiff may sue the city upon the contract, although the contract provides that payment shall not be made until the costs of the work has been collected from the abutting owners.

Common Council Bribery—Subject to Judicial Investigation.—A resolution by which the common council of a city undertakes to effect a compromise and settlement with a contractor to whom something is equitably due is an administrative, and not a legislative, act; and, if passed by means of fraud, can be declared invalid by the courts.

Estoppel.—In an action on a contract for local improvements, the defendant city was not estopped to contend that the passage of such a resolution was procured by means of bribery, it not appearing that defendant's officers knew of the alleged bribery at the time of the acts which were relied upon to create an estoppel.

APPEAL by defendant from supreme court, general term, Fourth department. *Reversed.*

The plaintiff, the survivor of his deceased partner, Charles Utting, brought this action to recover a balance that he

*See notes at end of case.

leged was due upon a contract entered into between the
m of Weston & Utting and the city of Syra-
se for the construction of what is generally
iown as the "Kennedy Street Sewer." The contract was
ecuted in November, 1889, and shortly thereafter Weston
Utting commenced the construction of the sewer; and,
ıring the few months following, the work so far progressed
at 1,453 feet of the sewer was constructed. Then a change
the city government took place, which resulted in a change
city engineers; and the new engineer, after some investiga-
ɔn, reported to the common council that the sewer was not
ing constructed in accordance with the contract. There-
ɔon the common council availed itself of the clause in the
ntract providing for such a contingency, and suspended
e work upon the claim that the contractors were not per-
rming the work as per agreement. The common council
en, by an appropriate committee, assisted by the engineer,
mmenced an investigation of the sewer so far as completed,
ıd of the manner of its construction. The sewer was visited
r this committee, and some of its members, in company
ith the deputy city engineer, passed through the sewer, and
ereafter reported the result of their investigation to the
mmon council.

Case Stated.

On the 29th day of July, 1890, the common council, hav-
g received the report, passed the following resolution:
Resolved, that the contractors, Weston & Utting, having
e contract for building the Kennedy street sewer, be re-
ıired to complete the part of the sewer already built in ac-
ɔrdance with the terms of the contract, except that the con-
actors need not be required to change the grade of the work
; it now exists, and that the invert portion shall remain as
ɔw laid. And the contract for said work is hereby amended
ıd modified to that extent, the remaining portion of said
wer to be constructed in accordance with the terms of said
ntract without modification." After the passage of the
solution, and before its approval by the mayor, the con-
actors entered into another contract, by which they agreed,

in addition to fulfilling the obligations imposed upon them by the resolution, to correct, if required, all sags that might exist in the bottom of the sewer. Pursuant to that resolution, the contractors went on and completed the balance of the sewer in accordance with the terms of the contract, as is conceded on all sides. In the meantime, resolutions were passed by the common council extending the time for the completion of the work under the contract, no objection thereto being offered by any of the members of the common council. October 20, 1890, a partial estimate was submitted to the common council by the city engineer for work done on the sewer, amounting to $3,141.50; and the common council, by a unanimous vote of all the members responding to the call of the roll, directed that a warrant be drawn for such amount. This was done, the mayor's signature attached, and the warrant paid. From time to time thereafter, down to January 5, 1892, other partial estimates for work done on the sewer were submitted to the common council, aggregating over $13,000, and such amounts were always paid by like direction of the common council. July 25, 1892, the commissioner of public works, through the city engineer, made and submitted to the common council a final estimate and account of the work done by the contractors, covering the whole distance of the sewer, and including extra work to the amount of $803.19, incurred in connecting the sewer with Oakwood Cemetery, which, after crediting payments already made, showed a balance due to the contractors of $9,433.41. The estimate was headed, "Final Account. City Engineer to John Weston and Charles Utting, Dr." Among other things, it contained the following certificate: "I hereby certify that, for the distance of 1,453 feet from Onondaga creek, the work was done in accordance with the resolution adopted by the common council the 29th of July, 1890. The next 1,000 feet were done in accordance with the contract and specifications, except in the matter of grade. At the beginning of the north end, the sewer is about two feet above the grade established by the original map, and at the end of

1,000 feet it is at said grade. The remaining portion of the sewer was completed in accordance with the contract and specifications." Subsequently, the common council passed a resolution directing that payment be made in accordance with the estimate, but the resolution was vetoed by the mayor; and thereafter, and on December 12, 1892, the common council passed a resolution affecting the 1,453 feet of the sewer first constructed, in which resolution it was recited that notice had been given to the contractors to take the necessary steps within three days to put their work in a condition to fulfill the terms of their contract, but that, notwithstanding such notice, the contractors did not, within the said three days, nor at all, take such measures as, in the opinion of the city engineer, were necessary to insure the satisfactory completion of said work, and it was "resolved, that said contract be, and the same is hereby, declared abandoned by said contractors, said Weston & Utting; and further resolved, that the commissioner of public works forthwith notify such contractors to discontinue all work under said contract." The city authorities having refused to accept the contract as completed, but, on the contrary, having formally declared it not completed, and the contract abandoned by the contractors, and having refused to take any steps whatever under it to make an assessment upon the property benefited, in order to raise the money with which to pay the expenses of constructing the sewer as provided by the contract, the plaintiff brought this action. He claims that, notwithstanding it was provided in the contract that no payment should be made until the cost was assessed upon and collected from the assessable taxpayers liable for local taxation for the construction of sewers, the defendant has been guilty of a breach of contract, and therefore he is entitled to recover the damages caused to him by their failure to make performance. Upon the trial it was insisted by the defendant, and testimony was offered tending to prove, that the contractors failed to comply with the contract in other respects than those mentioned in the

resolution of July 29th; and it is made to appear that after the passage of the resolutions declaring that the contractors, Weston & Utting, had abandoned the contract, the authorities had caused a portion of the sewer to be rebuilt. Evidence tending to show faulty construction was given. On the other hand, testimony was presented tending to support the contention of the plaintiff that all the variations from the contract were made with the knowledge of the city engineer in charge of the work, and done with his approval and by his direction; and it was insisted that such approval and direction were founded upon actual necessity in some respects, and good judgment in others. The court decided that, as to the variations in the construction of the sewer referred to in the resolution of July 29th, the common council had waived strict performance, and modified the contract to that extent, and that they had also waived such defects as had come to the knowledge of the common council before passing this resolution, although the defects were not mentioned therein; and he submitted to the jury the question whether, in all other respects, there was a substantial performance of the contract by the contractors, and the verdict in favor of the plaintiff constituted an affirmative answer to that question. The judgment entered thereon was affirmed at the general term. Other facts appear in the opinion.

Charles E. Ide, for appellant.
George H. Sears, for respondent.

PARKER, C. J. (after stating the facts). On this review it must be taken as established by the verdict of the jury that the plaintiffs substantially performed their contract with the defendant, except as to the construction of the first 1,453 feet of the sewer, the work upon which was done prior to the investigation by the common council. That investigation resulted in a resolution waiving performance so far as the work done was not in conformity with the plans and specifications, and modifying the contract to the extent that it should be in conformity with the work already done. The

trial court decided that the resolution of July 29, 1890, effected that result. The appellant concedes that such was the purpose of the common council, but nevertheless insists that it was beyond the power of that body to waive performance of any of the requirements of the contract or specifications, and that in holding otherwise error was committed. The result of our examination of the charter of the city of Syracuse leads us to the conclusion that it does not place any limitations upon the powers of the common council in respect to such acts as the common council undertook to perform by means of the resolution in question. Aside from certain limitations that we need not specify, all details are left to the common council, and not made the basis of the consent of the property owners. The modification attempted, therefore, was within the power of the common council, under the ruling of this court in Meech *v.* City of Buffalo, 29 N. Y. 198, Moore *v.* City of Albany, 98 N. Y. 396, and Voght *v.* City of Buffalo, 133 N. Y. 463, 31 N. E. 340.

Local Improvements—Authority of Common Council to Waive Performance.

The appellant next contends that the failure to obtain the certificate of the engineer entitled the defendant to a dismissal of the complaint. We think the certificate obtained was in compliance with the contract as modified by the resolution of July 29, 1890. The engineer could not certify that the work was performed in accordance with the original contract and specifications, because such was not the fact; but he did certify in effect that the work done after the 29th day of July, 1890, was in accordance with the contract and specifications, while the work done prior to that date was in conformity with the resolution adopted by the common council, by which an attempt was made to modify the contract. It was, in effect, therefore, a certificate that the work had been performed in accordance with the original contract as modified by the resolution of July 29, 1890, and was sufficient.

Engineer's Certificate.

The appellant also insists that the action was prematurely brought, because no part of the contract price has been as-

sessed or collected. The contract provides: "No payment shall be made to the party of the first part under this contract until the cost of such work shall have been ascertained and assessed upon and collected from the taxpayers liable to local taxation for the same; * * * and, as soon thereafter as the cost of said work shall have been collected from said taxpayers, the party of the first part shall be entitled to receive the amount due on said final account. * * *" This clause in the contract is not an unusual one, nor is it, or at least an equivalent provision, a stranger to the courts. As long ago as the action of Hunt *v.* City of Utica, 18 N. Y. 442, the court had under consideration a contract of this character. After its completion, and on the 16th day of November, the claim for compensation was allowed by the common council, "payable when collected by assessment." On the 7th of December following, the common council made the necessary assessment, and directed that measures be taken for the collection thereof. On January 26th the assignee of the contractor commenced an action to recover the contract price. At that time no part of the assessment had been paid, but five days later the treasurer issued a warrant for its collection, which was in the hands of the collector at the time of the commencement of the action. It was held that the plaintiff could not recover. The decision of the court in that case has not been questioned in any subsequent case, and the decision of many succeeding cases has been governed by the principle enunciated in that case, *viz.* that where a way of payment is prescribed by statute or by contract that way must be strictly pursued. People *ex rel.* Ready *v.* City of Syracuse, 144 N. Y. 63, 38 N. E. 1006; Swift *v.* Mayor, etc., 83 N. Y. 528, 533; Howell *v.* City of Buffalo, 15 N. Y. 512, 519; Baldwin *v.* City of Oswego, 1 Abb. Dec. 62, 68; Beard *v.* City of Brooklyn, 31 Barb. 142, 149; Dannat *v.* Mayor, etc., 66 N. Y. 585.

Right of Action.

Such a provision as to work of this character is usual and reasonable; for, as the municipal authorities have no right to make such improvements at the expense of the taxpayers

generally, it follows—First, that no money is raised by general taxation that is available for the payment of such expenses; and, second, that it is necessary to make the avails of the special assessment meet the obligations of the city under the contract. All this is known to the contractor when he makes his bid and enters into the contract, and presumably he has provided suitable compensation to himself for the loss of the use of the sums due under his contract until a reasonable time shall have elapsed in which to levy the assessment and make collection. If he finds, as in the case of People *ex rel.* Ready *v.* City of Syracuse, *supra*, that the city has not proceeded with reasonable diligence to collect the assessment, and turn over the proceeds to him, he may and should proceed by *mandamus* to compel such action on its part. But where a municipality disables itself from performing the contract by such action on its part as makes void, and therefore uncollectible, an assessment, for the purpose of providing compensation, or refuses to perform the contract on its part, as in Reilly *v.* City of Albany, 112 N. Y. 30, 19 N. E. 508, then an action against the city for the damages sustained by reason of its failure to perform the contract on its part may be maintained. It has been suggested that the two cases last referred to are in conflict, but they are not. The Ready Case points out that, prior to the breach of the contract by the municipality, the contractor's remedy is to apply for a *mandamus* to hasten municipal action in the absence of due diligence; while the Reilly Case, with equal clearness, marks out the path to be pursued by the contractor, where the other party, to wit, the municipality, either designedly or accidently puts itself in a position where it will not or cannot perform the contract on its part. In such a case the remedy is against the city for breach of the contract. As we must regard the facts as found by the verdict of the jury, this case comes under the rule in Reilly's Case, for the plaintiffs have fully performed the contract as modified by the resolution of July 29, 1890, and are entitled to compensation therefor. But the defendant, instead of

recognizing the plaintiffs' rights in the premises, and proceeding with reasonable diligence to levy the assessment, collect and turn it over to the plaintiffs has declared by resolution that the contractors have not only not performed, but have abandoned, the contract, has let to other contractors the rebuilding of a portion of the sewer constructed by these plaintiffs, and has refused to take any steps looking to the making of an assessment upon the property benefited for the purpose of raising the money with which to pay the plaintiffs, as provided by the contract. The plaintiffs' right, therefore, to pursue the defendant for a breach of the contract, is established.

We are thus brought to the last, but not the least, of the interesting questions presented by the appellant, which is that the court ought to have permitted the defendant to prove that the passage of the resolution of July 29, 1890, was corruptly procured. The importance of this question in this particular case is readily apparent. It is not pretended that the contract was substantially performed as to the construction of the first 1,453 feet of the sewer. The certificate of the engineer, which the contract says must be given in order to entitle the plaintiffs to the compensation provided for by the contract, does not assert that, as to the portion of the sewer above referred to, the contract was performed. On the contrary, the certificate is to the effect that performance in that respect is in accordance with the contract as modified by the resolution of July 29, 1890. If that resolution be void and of no effect, then the plaintiffs have not established their right to recover in this action; for they have not only failed to prove the making of the necessary certificate by the engineer, but they have failed to prove substantial performance on their part.

The question is also an important one in its public aspects, for, so far as we have observed, it has seldom been brought to the attention of the courts. The counsel for the respondent insists that the question was not before the court in such a manner as required it to pass upon the point involved. Let

us inquire of the record whether he is right or not. The answer alleges, among other things, "that the said resolution, purporting to modify said contract, passed by the common council on the 29th day of July, 1890, as set forth in said complaint, was passed collusively, corruptly, and fraudulently,and is the result of a corrupt bargain,in and by which it was agreed that a large sum of money should be paid by said contractors for a vote in favor of said resolution, which said money was paid, and that said resolution, by reason thereof, is null and void and of no effect as a modification of said contract." During the progress of the trial the counsel for the corporation asked several questions which brought to the attention of the court and the counsel for the plaintiffs the defense relied upon by the city, and which we have in part quoted. The court was inclined to the view that the resolution was a legislative act, and could not be thus attacked, whereupon the defendant's counsel, for the purpose of raising the question in the briefest form, said: "I desire to show that Mr. Weston [plaintiff] procured a vote of one member of the common council by corrupt means; that a sum of money was paid by the plaintiff, and accepted by a member of the common council, in consideration of his vote for the adoption of that resolution; and that the vote of such member was obtained and cast by him in consideration of the payment of such sum of money." This offer was denied, and the evidence excluded by the court, the defendant excepting. It is not, of course, claimed that, if the resolution was in fact procured to be passed by bribery, it would, nevertheless, constitute a valid and effective modification of the contract. That it would be void as against public policy is too clear to admit of discussion; but the contention rather is that the courts are without power to inquire into the matter. The reason assigned is that the act of the common council in passing this resolution was legislative in character, and hence the motives that induced the members to vote for its passage, whether honest or corrupt, are not the subject of judicial investigation. It is true that the legislative department of the state government

is sovereign, and hence the motives that induce its action cannot be the subject of judicial investigation. The constitution also empowers the legislature, by general laws, to confer upon boards of supervisors of the counties of the state such powers of local legislation and administration as the legislature may from time to time deem expedient. Const. art. 3, § 27. It has been held that the action of a board of supervisors in undertaking to establish a fire district in a town, under section 37 of the county law, is legislative in character, and therefore not subject to review by *certiorari*, because the affidavits verifying the petition did not state that the petition complied with the requirements of the statute. People *v.* Board of Sup'rs of Queens Co., 153 N. Y. 370, 47 N. E. 790.

In People *v.* McIntyre, 154 N. Y. 628, 49 N. E. 70, it was held that, within the limits of the power delegated to supervisors by the legislature under the authority conferred upon it by the section referred to, each board of supervisors is clothed with the sovereignty of the state to legislate as to all details, precisely the same as the legislature might have done in the premises. While that is so, there are many duties devolved upon boards of supervisors by the legislature which are not legislative in character, but are administrative, and in some instances *quasi* judicial in nature, and not at all impressed with the character of sovereignty. Among other duties they are required to audit and allow claims against the county. If they arbitrarily refuse to audit a claim the court may, by *mandamus*, require them to take action thereon. People *v.* Board of Sup'rs of Delaware Co., 45 N. Y. 196, 199. So, where the board of supervisors audit and allow to a public officer a sum in excess of that legally due him, the court will, by a *mandamus*, and upon the application of a taxpayer, require the board to reconsider, revoke, and annul the audit as to such excess. People *v.* Board of Sup'rs of Westchester Co., 73 N. Y. 173. While the acts of boards of supervisors or boards of town auditors, in auditing the accounts within their jurisdiction, are, in the absence of fraud

and collusion, final and conclusive, and not the subject of attack in a collateral proceeding, they may, nevertheless, be attacked in such a proceeding in an action brought by a taxpayer, under chapter 161 of the Laws of 1872. Osterhoudt *v.* Rigney, 98 N. Y. 222.

Many cases might be cited where boards of supervisors have been compelled to act by *mandamus* where they have failed to perform the duties which the law enjoined upon them, as well as cases where their action, involving legal errors distinguished from discretionary matters, have been reviewed by *certiorari*, and also where the audit has been attacked in a collateral action brought under the "Taxpayers' Statute," so called. But it would serve no good purpose, as the cases already cited are sufficient to call attention to the fact that there are many administrative duties of boards of supervisors that are not impressed with the character of sovereignty. So, too, the legislature may confer upon common councils of cities authority to pass municipal ordinances. Such as are passed in pursuance of such authority have the force of law, and are as obligatory as if enacted by the legislature itself. City of Buffalo *v.* New York, L. E. & W. R. Co., 152 N. Y. 276, 46 N. E. 496. But, like boards of supervisors, a common council has many administrative duties that are not legislative in character, performance of which, at times, has to be compelled by the courts. Not infrequently in the case of special assessments for local improvements, such as the case at bar, actions are successfully prosecuted by taxpayers to set aside assessments against property, on the ground that the assessments are illegal and void. In Miller *v.* City of Amsterdam, 149 N. Y. 288, 43 N. E. 632, in pursuance of legislative authority, the common council undertook to, and did, pave a certain street, and, to defray the expense thereof, made an assessment against the property specially benefited; but the statute under which the common council attempted to act provided that the street could be paved only upon a petition therefor of the owners of a majority of the lineal feet fronting on the

street. The petition presented, and upon which the common council acted, turned out not to have the requisite number of consents. This court held that the action of the common council was without jurisdiction, and affirmed the judgment setting aside the assessment against the property of the plaintiff, upon the ground that it was void. If the common council in Miller's Case, in the institution of proceedings to pave the street, had been acting in a legislative capacity, and was sovereign in that which it did, then, necessarily it would not have been open for inquiry by the courts whether it had acquired jurisdiction to legislate at all by the petition of the requisite number of lot owners. But it was not sovereign. It had no authority to act at all in the absence of a petition signed by the owners of a majority of the lineal feet fronting on the street, and therefore its proceedings were not in accordance with the directions of the charter; and, in attempting to act as it did, its proceedings were the subject of direct review by *certiorari*, or to attack in a collateral action such as was made. If the action taken by a common council under the statute to pave a street be not sovereign and free from direct review or collateral attack in the courts, no more is the action of a common council, under a similar statute, to build a sewer; and it is yet more absurd to claim that the resolution by which the common council undertook to effect a compromise and settlement with a contractor to whom something was equitably due, though, perhaps, nothing legally, because of his failure to perform the contract in all respects, constituted a legislative act.

Common Council—Bribery—Subject to Judicial Investigation.

Having established by authority (to which very many citations in point in this state might be added) that the resolution in question constituted a part of the administrative duties of the common council, we come next to the question whether such a resolution, if passed by means of fraud and corruption, can be declared of no effect by the courts. This question is answered in the affirmative by Talcott *v.* City of Buffalo, 125 N. Y. 280, 26 N. E. 263. That was an action

by a taxpayer to prevent waste of or injury to the property of the municipality, the claim being that the common council of the city of Buffalo had passed the resolution over the mayor's veto, providing for the substitution of electric lights for gas, and that, in pursuance of it, the proper officers had entered into a contract with the electric light company, by which it had been agreed to pay an exorbitant price; and it was charged that the acts of the common council and its officers in the matter were illegal. The court held that, inasmuch as the action taken by the common council was clearly within its power and discretion, such an action could not be maintained without any charge or allegation of fraud, collusion, corruption, or bad faith. While upon this proposition there was a dissent, all were agreed that under the "Taxpayers' Act," so called, the complaint would not have been demurrable had it alleged that the acts complained of were without power, or that they were the result of corruption, fraud, or bad faith amounting to fraud. That action, it is true, was brought under and by virtue of the provision of the statute giving to taxpayers the right by action in a proper case to interfere with the conduct of municipal officers. The title of the act first passed (chapter 161, Laws 1872) was "An act for the protection of taxpayers against the frauds, embezzlements and wrongful acts of public officers and agents." It has since been amended and supplemented by various enactments, which need not now be referred to. This statute did not take away any right of action that the municipality had; and, to avoid any possible opportunity for such a suggestion, the last sentence of the statute provided that it should not be so construed as to take away any right of action from any county, town, or municipal corporation. The history attending the passage of this act, and of chapter 49 of the Laws of 1875, is a matter of common knowledge, and was well stated by JUDGE ANDREWS in People *v.* New York & M. B. Ry. Co., 84 N. Y. 565, 569, as follows: It "was passed in view of the fact that the city of New York had been grossly defrauded by the acts of municipal officers and others acting in collusion

with them, and that large sums had been taken from the municipal treasury in the perpetration of the frauds committed. These sums the city or county, one or both of them, might sue for and recover; but resort to this remedy was embarrassed by the fact that the city and county governments were to a considerable extent under the control of the guilty participants in the fraud."

The effect of the legislation is to enable a taxpayer of the municipality, threatened with injury from its officers, and in certain cases the state, to accomplish by action not more than the proper municipal authorities can at all times accomplish, but such results as the municipal authorities can and should, but, because of carelessness or willful purpose, will not. If it be the fact that the passage of this resolution was brought about by bribery of the members of the common council, a taxpayer, under the authority of Talcott's Case, *supra*, could have maintained a suit against the city to join it from paying to the contractors the amount claimed by them to be due under their contracts, for the reason that the statute confers upon him the authority to thus interfere for the protection of the municipal corporation; and that which he can accomplish by such a suit, the officers of the municipal corporation, whose duty it is to protect the corporate property from waste and injury, may bring about by a defense to an action brought by the contractor. It is urged by the respondent that the defendant is estopped by the conduct of its officers subsequent to the discovery by the common council of the alleged acts of bribery. But the difficulty with this contention is that it does not appear that the officers of the defendant knew of the alleged bribery at the time of the several acts which the plaintiffs rely upon to create an estoppel. It does appear that, before the commission of some of the acts, the common council caused an investigation of the charge of corruption to be made; but it is not shown that one of the outcomes of the investigation was the disclosure of the alleged acts of bribery that the defendant upon the trial offered to prove, and therefore it

Estoppel.

cannot be said that the action taken by the common council was with full knowledge of the situation. The judgment should be reversed; and a new trial granted, with costs to abide the event. All concur, except BARTLETT, J., dissenting, and MARTIN and VANN, JJ., not sitting. Judgment reversed, etc.

NOTES.

City Council is Judge Whether Work was Done According to Contract.—Whether or not work upon a local improvement has been done according to the contract, is a question of which the city council must judge, and not the party for whose benefit the improvement was made. Joyes *v.* Shadburn, (Kentucky, April 8, 1890), 13 S. W. Rep. 361.

Contracts for Local Improvements—Liability of Municipality.—Where a local improvement is to be assessed wholly upon the property which receives the benefit therefrom, it has been held that the contractor may recover his compensation of the municipality if it fails to make the requisite assessment or delays for an unreasonable time to collect and pay the amount due. Beard *v.* Brooklyn, 31 Barb. (N. Y.) 142. See Goodrich *v.* Detroit, 12 Mich. 279; Cumming *v.* Mayor, &c. of Brooklyn, 11 Paige (N. Y.) Ch. 596; Baker *v.* Utica, 19 N. Y. (5 Smith) 326; Green *v.* Mayor, &c. of New York, 5 Abb. Pr. (N. Y.) 503; Reilly *v.* Albany, 112 N. Y. 30, approving Cumming *v.* Brooklyn, *supra*; Sage *v.* Brooklyn, 89 N. Y. 189; McCormack *v.* Brooklyn, 108 N. Y. 49; Galveston *v.* Heard, 54 Tex. 420; Atchison *v.* Byrnes, 22 Kan. 65; Craycraft *v.* Selvage, 10 Bush. (Ky.), 696 (1874).

DEWEY

v.

CITY OF DES MOINES *et al.*

(*Supreme Court of the United States, February 27, 1899.*)

State Courts—Federal Questions—Review.—When a party raised only one federal question in the state courts, he cannot come into the supreme court of the United States and argue such question, and also another not connected with it, and which was not raised in any of the courts below, and does not necessarily arise on the record,

although this record shows the existence of facts upon which the question might have been raised.

Same—Same—Same.—A question as to the invalidity of a personal judgment against a non-resident of the state for the excess of an assessment for local improvements above the amount realized from the sale of his city lots within the state and the question as to the invalidity of the assessment upon the lots are not so connected that both are necessarily raised by one assignment of error.

Same—Same—Same.—The question whether the collection of an assessment exceeding the value of the property assessed amounts to a taking of property without due process of law is not raised by the mere allegation that the amount of an assessment exceeds the value of the property assessed; and that defendants are seeking to enforce not merely a sale of such property, but also to compel plaintiff to pay the full amount of such assessment, regardless of the amount realized from such sale.

Local Assessments—Non-Residents—Personal Liability—Constitutional Law.*—A statute attempting to impose upon a non-resident of the state, upon whom no process has been served, a personal liability for the excess of an assessment for local improvements above the amount realized from the sale of his city lots abutting on such improvements is, to such extent, in violation of the provision of the federal constitution prohibiting the taking of property without due process of law.

Jurisdiction.—A non-resident by resorting to a state court to obtain relief from such an assessment and from such personal liability does not thereby render himself liable to a judgment providing for such personal liability.

ERROR by plaintiff to the Supreme Court of the State of Iowa. *Reversed and remanded.*

The petition in this case was filed by the plaintiff in error to set aside certain assessments upon his lots in Des Moines, in the state of Iowa, which had been imposed thereon for the purpose of paying for the paving of the street upon which the lots abutted, and to obtain a judgment enjoining proceedings towards their sale, and adjudging that there was no personal liability to pay the excess of the assessment above the amount realized upon the sale of the lots.

Case Stated.

The petition alleged that the petitioner was at all times

*See note at end of case.

during the proceedings mentioned a resident of Chicago, in the state of Illinois, and that he had no actual notice of any of the proceedings looking towards the paving of the street upon which his lots abutted; that the street was paved under the direction of the common council, which decided upon its necessity, and the expense was, by the provisions of the Iowa statute, assessed upon the abutting property, and the lot owner made personally liable for its payment; that the expense of the improvement was greater than the value of the lots assessed, and the common council knew it would be greater when the paving was ordered.

Various other facts were set up touching the invalidity of the assessment upon the lots, but no allegation was made attacking its validity by reason of any violation of the federal constitution. Under stipulation of the parties, various allegations of fraud upon the part of the members of the common council, which had been included in the petition, were withdrawn, and the allegations of the petition as thus amended were not denied.

The contractor who did the work of paving the street was made a party to this proceeding, and he set up a counterclaim asking that the certificates given him by the city in payment for his services, and which by statute were made a lien upon the lots abutting upon the street, might be foreclosed, and the lots sold, and a personal judgment pursuant to the same statute rendered against the plaintiff in error.

By stipulation, certain motions, which were made to strike out allegations in the petition, were treated as demurrers to the petition, and the case was thus placed at issue.

Upon the trial the district court of Polk county gave judgment dismissing the petition, with costs, and in favor of the contractor on his counterclaim, foreclosing the lien of the latter, and ordering the sale of the lots, and the judgment also provided for the issue of a personal or general execution against the plaintiff in error to collect any balance remaining unpaid after sale of the lots.

Dewey *v.* City of Des Moines

Plaintiff took the case to the state supreme court, and there made an assignment of errors, one of which is as follows:

"The court erred in holding and deciding that plaintiff was personally liable to said Des Moines Brick-Manufacturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should issue against plaintiff, and in favor of said Des Moines Brick-Manufacturing Company, for the balance of such tax or assessment; and, further, that, as plaintiff was at all times a nonresident of the state of Iowa, and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law, and was in contravention of the provisions on that subject of the fourteenth amendment to the constitution of the United States, as well as in contravention of the provisions of the constitution of the state of Iowa on the same subject."

The supreme court affirmed the judgment of the district court (70 N. W. 605), and plaintiff brought the case here by writ of error.

A. E. Harvey, for plaintiff in error.

N. T. Guernsey, for defendants in error.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The only one of the assignments of error made in the state supreme court which has reference to any federal question is the one set forth in the statement of facts, and it will be seen that such assignment relates solely to the validity of the provision for the personal liability imposed upon plaintiff in error by the judgment of the district court. None of the other assignments of error involves any federal question.

In the brief for plaintiff in error in this court it is said that the "counsel for plaintiff in error in the state court seem to have relied upon one single proposition only as involving a federal

question, to wit: As plaintiff was at all times a nonresident of the state of Iowa, and had no personal notice or knowledge of the assessment proceedings, the imposition of the personal liability against him in excess of the value of all the lots was not due process of law, and was in contravention of the provisions upon that subject of the fourteenth amendment of the constitution of the United States."

The counsel, however, does not confine himself in this court solely to a discussion of the federal question which was contained in the assignment of error above set forth, and which was argued in the court below, regarding the validity of a personal judgment; but counsel claims the further right to attack the validity of the assessment upon the lots themselves, because, as he asserts, it was laid without regard to any question of benefits, and that it exceeds the actual value of the property assessed, and that, even if it permitted by the statute of Iowa, such an assessment constitutes a taking, under the guise of taxation, of private property for public use, without just compensation, and is therefore void, under the federal constitution, as amounting to a taking of property without due process of law.

This is a very different question from that embraced in the assignment of errors and argued in the supreme court of the state.

It is objected on the part of the defendant in error that, as this is a review of a judgment of a state court, this second question cannot be raised here, because it was not raised in the courts below and was not decided by either of them.

Reference to the opinion of the supreme court of the state shows that it was not therein discussed or decided. If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.

Parties are not confined here to the same arguments which

were advanced in the courts below upon a federal question there discussed. Having, however, raised only one federal question in the court below, can a party come into this court from a state court, and argue the question thus raised, and also another not connected with it, and which was not raised in any of the courts below, and does not necessarily arise on the record, although an inspection of the record shows the existence of facts upon which the question might have been raised?

State Courts—Federal Questions—Review.

The two questions, the one as to the invalidity of the personal judgment, and the other as to the invalidity of the assessment upon the lots, are not in any wise necessarily connected, any more than that they both arise out of the proceedings in paving the street and in levying the assessment. The assessment upon the lots might be valid, while the provision for a personal judgment might be void, each depending upon different principles, and the question as to the invalidity of the personal judgment might, as in this case, be raised and argued without in any manner touching the question as to the invalidity of the assessment upon the lots.

Same—Same—Same.

In Oxley Stave Co. *v.* Butler Co., 166 U. S. 648, 17 Sup. Ct. 709, it was held that the federal question must be specially taken or claimed in the state court; that the party must have the intent to invoke, for the protection of his rights, the constitution or some statute or treaty of the United States; and that such intention must be declared in some unmistakable manner, and unless he do so this court is without jurisdiction to re-examine the final judgment of the state court upon that matter. See also Levy *v.* Superior Court of San Francisco, 167 U. S. 175, 17 Sup. Ct. 769; Kipley *v.* Illinois, 170 U. S. 182, 18 Sup. Ct. 550. In other words, the court must be able to see clearly from the whole record that a provision of the constitution or act of congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, 143. In the case at bar no claim was made

in the state court that the assessment upon the lots was invalid, as in violation of any provision of the federal constitution.

Nor does the record herein show, by clear and necessary intendment, that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it. In such case it has been held that the federal question sufficiently appears. Green Bay & M. Canal Co. *v.* Patten Paper Co., 172 U. S. 58. 68, 19 Sup. Ct. 97, and cases cited. In substance, the validity of the statute or the right under the constitution must have been drawn in question. Powell *v.* Brunswick Co., 150 U. S. 433, 14 Sup. Ct. 166; Sayward *v.* Denny, 158 U. S. 180, 15 Sup. Ct. 777. The latest decision to this effect is Capital Nat. Bank of Lincoln *v.* First Nat. Bank of Cadiz, 172 U. S. 425, 19 Sup. Ct. 202.

Although no particular form of words is necessary to be used in order that the federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which, at least, would call its attention to the federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was, by its necessary effect, a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law. Roby *v.* Colehour, 146 U. S. 153, 159, 13 Sup. Ct. 47; Chicago, B. & Q. R. Co. *v.* City of Chicago, 166 U. S. 226, 231, 17 Sup. Ct. 581; Green Bay & M. Canal Co. *v.* Patten Paper Co., and Capital Nat. Bank of Lincoln *v.* First Nat. Bank of Cadiz, *supra*.

In all these cases it did appear from the record that the rights were set up or claimed in such a way as to bring the subject to the attention of the state court. It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a federal nature. Hamilton Co. *v.*

Massachusetts, 6 Wall. 632. In order to be available in this court, some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed, it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough. But the denial, whether expressed or implied, must be of some right or claim, founded upon the constitution or the laws or treaties of the United States, which had in some manner been brought to the attention of the court below. The record shows nothing of the kind in this case.

A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. Hamilton Co. *v.* Massachusetts, *supra.* A point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of.

No question of a federal nature claimed under the constitution of the United States can be said to have been made by the mere allegation "that the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together, the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce, as against plaintiff, not merely a sale of said lots, but also to compel plaintiff to pay the full amount of said tax, regardless of whatever sum said lots may be sold for and regardless of the actual value of the same." There is nothing else in the

Same—Same —Same.

record which can be said to raise this federal right or claim.

Upon these facts, we are compelled to hold that we are confined to a discussion of the only federal question which this record presents, *viz.* the validity of the personal judgment against the plaintiff in error. The assignment of error above set out is broad enough to raise the question, not only as to the sufficiency of notice, but as to the validity of such a judgment against a nonresident.

It is asserted in the petition that the defendant Dillworth, the treasurer of Holt county, is attempting to enforce the assessment levied by the common council, and that he claims plaintiff in error is personally liable for the taxes and interest, and will enforce payment thereof unless restrained, and that plaintiff's personal property is liable to be illegally seized for the payment of the tax. These allegations are substantially admitted by the answers of the defendants, except as to the illegality of the possible seizure of plaintiff's personal property. By filing the counterclaim, the contractor makes a direct attempt to enforce, not only the lien upon the lots, but the personal liability of the lot owner. Thus, a nonresident, simply because he was the owner of property on a street in a city in the state of Iowa, finds himself, by the provisions of the state statute, and without the service of any process upon him, laid under a personal obligation to pay a tax assessed by the common council or by the board of public works and city engineer, under the statute, upon his property abutting upon the street, for the purpose of paying the expenses incurred in paving the street, which expenses are greater than the benefit the lots have received by virtue of the improvement. The plaintiff, prior to the imposition of that assessment, had never submitted himself to the jurisdiction that state of Iowa, and the only jurisdiction that state had in the assessment proceedings was over the real property belonging to him and abutting on the street to be improved. An assessment upon lots for a local improvement is in the nature of a judgment.

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It is said that the statute (Code Iowa, § 478) provides for the personal liability of the owner of lots, in a city in the state of Iowa; to pay the whole tax or assessment levied to pay the cost of a local improvement, and that the same statute provides that the assessment shall also be a lien upon the respective lots from the time of the assessment. It is also said that the statute has been held to be valid by the Iowa supreme court. This seems to be true. City of Burlington *v.* Quick, 47 Iowa, 222, 226; Farwell *v.* Manufacturing Co., 97 Iowa, 286, 66 N. W. 176. The same thing is also held in the opinion of the state court delivered in the case now before us.

In this case no question arises with regard to the validity of a personal judgment like the one herein against a resident of the state of Iowa, and we therefore express no opinion upon that subject. This plaintiff was at all times a nonresident of that state and we think that a statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner, who is a nonresident of the state, a personal liability to pay such assessment, is a statute which the state has no power to enact, and which cannot, therefore, furnish any foundation for a personal claim against such nonresident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement by which it can be shown that any jurisdiction to collect the assessment personally from a nonresident can exist. The state may provide for the sale of the property upon which the assessment is laid, but it cannot, under any guise, or pretense, proceed further, and impose a personal liability upon a nonresident to pay the assessment or any part of it. To enforce an assessment of such a nature against a nonresident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be a violation of the federal constitution.

Local Assessments—Non Residents—Personal Liability—Constitutional Law.

In this proceeding of the lot owner to have the assessment

set aside, and the statutory liability of plaintiff adjudged invalid, the court was not justified in dismissing the petition, and giving the contractor, not only judgment on his counterclaim foreclosing his lien, but also inserting in that judgment a provision for a personal liability against the plaintiff and for a general execution against him. Such a provision against a nonresident, although a litigant in the courts of the state, was not only erroneous, but it was so far erroneous as to constitute, if enforced, a violation of the federal constitution, for the reason already mentioned. By resorting to the state court to obtain relief from the assessment and from any personal liability provided for by the statute, the plaintiff did not thereby in any manner consent, or render himself liable, to a judgment against him providing for any peasonal liability. Nor did the counterclaim made by the defendant contractor give any such authority.

Jurisdiction.

The principle which renders void a statute providing for the personal liability of a nonresident to pay a tax of this nature is the same which prevents a state from taking jurisdiction through its courts, by virtue of any statute, over a nonresident not served with process within the state, to enforce a mere personal liability, and where no property of the nonresident has been seized or brought under the control of the court. This principle has been frequently decided in this court. One of the leading cases is Pennoyer *v.* Neff, 95 U. S. 714, and many other cases therein cited. Railway Co. *v.* Pinkney, 149 U. S. 194, 209, 13 Sup. Ct. 859.

The lot owner never voluntarily or otherwise appeared in any of the proceedings leading up to the levying of the assessment. He gave no consent which amounted to an acknowledgment of the jurisdiction of the city or common council over his person.

A judgment without personal service against a nonresident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a nonresi-

dent further than respects the property so taken. This is as true in the case of an assessment against a nonresident of such a nature as this one as in the case of a more formal judgment.

The jurisdiction to tax exists only in regard to persons and property or upon the business done within the state, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a nonresident personally liable to pay a tax of the nature of the one in question. All subjects over which the sovereign power of the state extends are objects of taxation. Cooley, Tax'n (1st. Ed.) pp. 3, 4; Burroughs, Tax'n. § 6. The power of the state to tax extends to all objects within the sovereignty of the state. Per MR. JUSTICE CLIFFORD, in Hamilton Co. *v.* Massachusetts, 6 Wall. 632, at page 638. The power to tax is, however, limited to persons, property, and business within the state, and it cannot reach the person of a nonresident. Case of the State Tax on Foreign-Held Bonds, 15 Wall. 300, 319. In Cooley, Tax'n (1st Ed.) p. 121, it is said that "a state can no more subject to its power a single person or a single article of property, whose residence or legal situs is in another state, then it can subject all the citizens or all the property of such other state to its power." These are elementary propositions, but they are referred to only for the purpose of pointing out that a statute imposing a personal liability upon a nonresident to pay such an assessment as this oversteps the sovereign power of a state.

In this case the contractor, by filing his counterclaim herein, has commenced the enforcement of an assessment and a personal liability imposed by virtue of just such a statute, and the judgment under review gives him the right to do so. The lot owner is called upon to make such defense as he can to the claim of personal liability or else be forever barred from setting it up. He does claim that as a nonresident he did not have such notice, and the state or city did not obtain such jurisdiction over him, with regard to the original assessment, as would authorize the establishment of

Note

any personal liability on his part to pay such assessment.

The contractor nevertheless has obtained a judgment, not alone for a foreclosure of his lien, but also for the personal liability of the lot owner, and, unless he can in this proceeding have the provision in the judgment for a personal liability stricken out, the lot owner cannot thereafter resist it, even when the lots fail (if they should fail) to bring enough on their sale to satisfy the judgment.

The case of Davidson *v.* New Orleans, 96 U. S. 97, has been cited as authority for the proposition that the rendering of a personal judgment for the amount of an assessment for a local improvement is a matter in which the state authorities cannot be controlled by the federal constitution. It does not appear in that case that the complaining party, in regard to the state statute, was a nonresident of the state, but, on the contrary, it would seem that she was a resident thereof. That fact is a most material one, and renders the case so unlike the one at bar as to make it unnecessary to further refer to it.

The statute, upon which the right to enter this personal judgment depends, being, as to the nonresident lot owner, an illegal enactment, it follows that the judgment should and must be amended by striking out the provision for such personal liability. For that purpose the judgment is reversed, and the cause remanded to the supreme court of Iowa for further proceedings therein not inconsistent with this opinion.

So ordered.

NOTE.

Service of Process Upon Non-residents.—Subject to the constitutional provision that no state shall deprive any person of life, liberty or property without due process of law, any state has the right and power to subject the property of a non-resident within its territorial limits to the satisfaction of the claims of its citizens by any mode of procedure which it may deem proper and convenient. But the judgment or decree of the court of a state can have no force beyond its own limits, unless the defendant was actually served with process or unless he actually appeared. Thompson *v.* Allen,

86 Mo. 85; Galpin *v.* Page, 3 Sawy. (U. S.) 110; 18 Wall. (U. S.) 350; Thomas *v.* Lahone, 9 Bush (Ky.) 111.

In the language of the court by BEASLEY, C. J.: "Every independent government is at liberty to prescribe its own methods of judicial process, and declare by what means parties shall be brought before its tribunals." Mackey *v.* Gordon, 34 N. J. L. 291. See also Mutual L. Ins. Co. *v.* Pinner, 43 N. J. Eq. 52. See also the language employed in Freeman on Judgments (3d ed.), § 570, quoted in Nat. Bank *v.* Peabody, 55 Vt. 492, 45 Am. Rep. 633; Pennoyer *v.* Neff, 95 U. S. 719; Hollinsworth *v.* Barbour, 4 Pet. (U. S.) 466; Harris *v.* Hardeman, 14 How. (U. S.) 334; D'Arcy *v.* Ketchum, 11 How. (U. S.) 165, *note*; Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404; Webster *v.* Ried, 11 How. (U. S.) 437; Galpin *v.* Page, 18 Wall. (U. S.) 350; Thomas *v.* Whiteman, 18 Wall. (U. S.) 457; Melhop *v.* Doane, 31 Iowa 397, 7 Am. Rep. 147; Gunn *v.* Plant, 94 U. S. 664; Bissell *v.* Briggs, 9 Mass. 464, 6 Am. Dec. 88.

HUDDLESTON

v.

CITY OF EUGENE.

(*Supreme Court of Oregon, Jan. 23, 1899.*)

Conversion of Road into Street—Effect on Title to Fee.*—The public only acquires an easement in a street or county road which has been dedicated or condemned for its use; and the title to the fee is not changed by converting a county road into a street.

Same.—Where land is dedicated or appropriated for a surburban road, the implication must be that it shall be used as the convenience and welfare of the people may demand, although that demand may be augmented by a town or city springing up in the territory traversed by the road.

Same—Whether Additional Servitude.*—The conversion of a county road into a city street does not impose an additional servitude upon the fee for which compensation must be made, although such change renders adjacent property liable to assessment for improvements to which it was not exposed under existing law prior to the change.

Same—Construction of Charter.—A provision of a city charter re-

*See notes at end of case.

Huddleston *v.* City of Eugene

quiring the city council to cause the survey of a proposed new street or extension or line to which the width is to be changed or straightened, is not applicable where the city merely seeks to convert a county road into a city street of the same dimensions.

APPEAL by plaintiff from Lane county circuit court. *Affirmed.*

Case Stated.

This is a suit to enjoin the marshal of the city of Eugene from selling certain real property to satisfy an assessment for an alleged street improvement. The material facts are that plaintiff, as executrix of the last will and testament of James Huddleston, deceased, is entitled to the possession of a tract of agricultural land, upon the north side of which the county court of Lane county located and constructed a county road; that subsequent to the establishment of said road the legislative assembly passed an act incorporating the city of Eugene, whereby said premises were included therein (Laws 1889, p. 273); that the common council of said city, deeming it expedient to lay out a street and establish the grade thereof upon the line of said road, attempted to do so in the manner prescribed in section 90 of said act, but failed to comply strictly with its provisions. An ordinance was passed and approved, in pursuance of which said street was graded and graveled, and a strip of said land, 128 rods in length and 160 feet in width, adjoining the same, was assessed for the improvement in the sum of $315.02, and the amount thereof entered in the docket of city liens; but, the assessment becoming delinquent, a warrant for its collection was issued, and the marshal, obeying the command thereof, levied upon and threatened to sell the premises assessed, to prevent which this suit was instituted. The cause, being at issue, was referred to A. C. Woodcock, Esq., who took the evidence, from which he found, in substance, that notwithstanding the council had not complied with the provisions of section 90, *supra*, in establishing said street, section 98 of the charter authorized it to change the road into a street, and provided that, when so changed, jurisdiction thereof should be thereupon transferre

from the county to the city, and recommended that the temporary injunction theretofore issued be dissolved, and the suit dismissed. The court approved the report, and gave a decree in accordance therewith, from which plaintiff appeals.

L. Bilyen and *J. J. Walton*, for appellant.

E. R. Skipworth, for respondent.

MOORE, J. (after stating the facts). It is contended by plaintiff's counsel that the public has an easement only in a county road, while a qualified fee in the street is dedicated to, or condemned for, the public use; that a county road is laid out, built, and kept in repair by taxes collected from residents of the whole taxing district, and from property situated therein, while a street is usually established and improved by assessing the real property abutting thereon, and hence changing a county road into a city street imposes upon the premises claimed to have been improved additional burdens, and that this supplemental servitude constitutes private property, the taking of which for a public use is prohibited by the organic law of the state, except upon the payment of a just compensation (Const. Or. art. 1, § 18); that the power of a municipal corporation to exercise the right of eminent domain will not be implied, and, while section 98 of the charter authorizes the council to establish a street upon said county road, this can only be done by strictly pursuing the mode prescribed in section 90 of the act of incorporation, which is the measure of its power, but, the council having failed to observe such requirements, jurisdiction to improve said road was never acquired, and hence the assessment is void, and the court erred in dismissing the suit.

It is maintained by defendant's counsel, however, that section 90 only applies in cases where a street is to be established over premises where no highway theretofore existed, and, it being admitted that no additional land was appropriated by changing the road into a street, plaintiff sustained no injury in consequence thereof, and hence compliance with the requirements of said section was unnecessary.

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The provisions of the charter to which reference has been made are as follows:

"Sec. 90. Whenever the council shall deem it expedient to open, lay out, establish, widen, straighten or extend a street or alley it shall cause the city surveyor to survey such proposed new street or extension or line to which the width is to be changed or straightened, and make a report thereof containing a plat of the survey of such street or alley, of the portion of each lot or part thereof required to be appropriated for such street or alley, which report, if satisfactory to the council, shall be adopted by an ordinance embodying the same; provided, that before the adoption thereof, the recorder shall give notice of the filing of such report by publication for two weeks in some newspaper published in the city of Eugene, or by written notices posted for two weeks at three public places in said city, and at the next meeting of the council, after the expiration of such notice, present to it the said report, and attached thereto a copy of such notice, with the proof of publication or posting endorsed thereon. Thereafter and within thirty days from the adoption of such report, the council shall appoint three disinterested freeholders of the city of Eugene, no kin to any owner or person interested in any property to be appropriated, and possessing the qualifications of jurors in courts of justice in this state, to review such proposed street or alley, and make an assessment of the damages, if any, to the respective owners of the lots and parts of lots appropriated, and to report the same to the council. The said viewers shall meet at such time as may be designated by the council, and after having been duly sworn or affirmed to discharge their duties faithfully, shall proceed and view the whole distance of said proposed street or alley and ascertain and determine how much less valuable the premises of such owners, respectively, would be rendered by the opening of the same. If the council is satisfied that the amount of damages assessed by said viewers, or by the circuit court, upon appeal, as hereinafter provided, is just and equitable, and that the proposed

street or alley will be of sufficient importance to the public to cause the damages so assessed and determined to be paid by the city, the council shall order the same to be paid to the said owners, respectively, out of the treasury as other claims against the city are paid; but if in the opinion of the council such street or alley is not of sufficient importance to the public to cause the damage to be paid by the city of Eugene, the council may refuse to open such street or alley or extend or widen the same, as the case may be, unless the damages, or such part thereof as the council may think proper, shall be paid by private parties."

"Sec. 98. The common council has authority and is hereby authorized, when it shall deem it expedient, to open, establish and locate streets upon the road-bed of, and upon or across any county road or public highway within the corporate limits of the city of Eugene; and when so located or established, said county roads or public highways shall be and become public streets of said city and subject to jurisdiction and control of the council the same as other streets."

It was virtually conceded at the hearing by counsel for the respective parties that if it was necessary to pursue the method prescribed in section 90, in order to establish a street upon the line of the county road, the means adopted were ineffectual to confer jurisdiction. An important question to be considered is whether a change, by authority of the legislative assembly, of a county road to a city street, imposes an additional servitude upon the real property over which the highway is constructed. In Lankin *v.* Terwilliger, 22 Or. 97, 29 Pac. 268, it is held that by the location of a county road the public only acquires an easement in the land, while the fee remains in the owner, and when the road is vacated by public authority the land immediately reverts to the owner, freed from the easement. The heirs of James Huddleston, deceased, therefore had a reversionary interest in the land over which the highway was located; and plaintiff, by reason of her trust, was entitled to the possession thereof when the road should be vacated by proper authority. Phil-

lips *v.* Railway Co., 78 Pa. St. 177. The statute regulating the recording of town plats and vacating streets provides, in general terms, that when a town is laid out the proprietor must record the plat thereof in the recorder's office in the county in which the same is situated. Hill's Ann. Laws Or. § 4178. Every donation or grant to the public of a street marked as such on said plat shall be considered to all intents and purposes as a general warranty to the donee or grantee for the uses and purposes intended by the donor or grantor. Id. § 4180. When a street is vacated, the land theretofore used as a highway shall be attached to the lots or ground bordering on such street, and all right or title thereto shall vest in the person or persons owning the property on each side thereof in equal proportion, according to the length or breadth of such lots or ground as the same may border on such street. Id. § 4184. In McQuaid *v.* Railway Co., 18 Or. 237, 22 Pac. 809, it is held that the fee of a street is either in the adjacent lot owner, or remains in the dedicator. MR. CHIEF JUSTICE THAYER, considering section 4180 *supra*, in deciding the case, and discussing the effect of a dedication or condemnation of a street, says: "The public may have an irrevocable right to the use of the street, but how can it acquire the fee to the land? The fee must vest in some one having a legal capacity to take it. It must be a natural or artificial person,—must be some one having a legal entity. The declaration that the fee in such case is in the public, meaning the general mass of the people, without regard to any legal organization, although often made use of, is to my mind absolutely absurd. The public, as a mass, does not, in my opinion, possess any such capacity." While the question considered in that case was not deemed very important, the reasoning convinces us that the public only acquires an easement in a street which has been dedicated or condemned for its use. The interest of the public in a street or road being an easement only, the title to the fee was not changed by converting the road into a street, and hence no necessity

Conversion of Road into Street —Effect on Title to Fee.

existed for acquiring a right which the public already enjoyed. People *v.* Kerr, 27 N. Y. 188. The public easement in a county road is limited to the uses to which such a highway is commonly subjected, and it must be presumed that the condemnation of the land for such road by the county court was made with reference to such uses. The road was undoubtedly established over the particular route selected to promote travel between objective points, thereby facilitating the transportation of passengers and property by the mode in vogue when the highway was adopted. The imposition of a new servitude upon the land, in addition to and distinct from that to which it was originally subjected when taken for a highway, the obstruction of the abutting proprietor's access to the street, or the impairment of his right to light and air, constitutes a taking of private property for a public use, within the meaning of the fundamental law of the state, for which compensation must be made for the damages which necessarily ensue. Cooley, Const. Lim. *557; Elliott, Roads & S. 155; Willamette Iron Works *v.* Oregon Ry. & Nav. Co., 26 Or. 224, 37 Pac. 1016; Imlay *v.* Railroad Co., 26 Conn. 249; Milhau *v.* Sharp, 15 Barb. 193; Story *v.* Railroad Co., 90 N. Y. 122; State *v.* Laverack, 34 N. J. Law, 201; Heard *v.* City of Brooklyn, 60 N. Y. 242; Strong *v.* City of Brooklyn, 68 N. Y. 1. The ordinary mode of travel in cities at the present time is the same as that in vogue in the rural districts when the road was established. The use of the highway as a street will not be in addition to or distinct from that originally appropriated, and hence the conversion of the road into a street does not constitute a taking which demands additional compensation therefor on account of such use. Williams *v.* Railroad Co., 18 Barb. 222; Fagan *v.* City of Chicago, 84 Ill. 227. "The legislature of the state," says JUDGE DILLON in his work on Municipal Corporations (3d Ed., § 656), "represents the public at large. And has full and permanent authority over all public ways and public places." In Portland & W. V. R. Co. *v.* City of Portland, 14 Or. 188, 12 Pac. 265, it is held that an

act of the legislative assembly granting the use of a public levee of the city of Portland for railway purposes was a valid exercise of the lawmaking power. MR. CHIEF JUSTICE LORD, in rendering the decision says: "The interest in the use of the streets and highways and public places, and their uses, being *publici juris*, the power of regulating such use is in the legislature, as the representative of the whole people." To the same effect, see City of East Portland *v.* Multnomah County, 6 Or. 62; Multnomah Co. *v.* Sliker, 10 Or. 65. The legislature has plenary power to delegate to a municipal corporation or other agency the right to lay out, establish, and open highways for public use, and may also change its trustees, and impose upon the substituted instrumentality the duty of keeping such highways in repair. Simon *v.* Northup, 27 Or. 487, 40 Pac. 560; Little Nestucca Toll-Road Co. *v.* Tillamook Co., 31 Or. 1, 48 Pac. 465. JUDGE ELLIOTT, in his work on Roads and Streets (page 313), in speaking of the effect of the incorporation of a city upon the highways therein established by county authority, says: "Where there is no statute, the corporation of a city seems naturally to imply that the highways within its territorial limits become streets, and as such subject to the control of the municipality. The erection of such a corporation is, in truth, simply the creation of a new instrumentality of government. It comes into existence with the rights, powers, and duties of a governmental subdivision; and it is but reasonable to conclude that to such matters as streets, which peculiarly pertain to municipal corporations, the authority of other governmental corporations is excluded." In McGrew *v.* Stewart, 51 Kan. 185, 32 Pac. 896, the limits of a city were extended so as to include territory upon which a public highway existed. After the extension of the city boundaries, the council caused a sidewalk to be built along the highway, and assessed the cost thereof against the abutting property; and, in a suit to enjoin the collection of the assessment, it was held that upon the annexation of the territory the highway was impressed with the character of a street, and became subject to the

exclusive control of the city authorities, and to the liabilities and servitudes of all other streets within the city. To the same effect, see 15 Am. & Eng. Enc. Law 1017; Cowan's Case, 1 Overt. 311; McCullom *v.* Blackhawk Co., 21 Iowa, 409; Clark *v.* Com., 14 Bush, 166; Town of Ottawa *v.* Walker, 21 Ill. 605. Section 98 of the charter, however, shows that the county court of Lane county was not devested of jurisdiction of the road, notwithstanding the incorporation of the city, until the council deemed it expedient to establish a street over it. In State *v.* Jones, 18 Tex. 874, it is held, under a similar provision contained in a charter, that, until the council acts under the power conferred, the general authority of the county court over the subject-matter continues to exist, and may be exercised.

Same.

It is argued that the uses to which streets are ordinarily put are greater and more numerous than those to which a county road is subjected, and particularly so with reference to the laying of pipes and the construction of drains, sewers, and culverts in streets. 2 Dill. Mun. Corp. § 688. But JUDGE ELLIOTT, in his work on Roads and Streets (page 311), anticipating such contention, says: "Where land is dedicated or appropriated for a suburban road, the implication must be that it shall be used as the convenience and welfare of the public may demand, although that demand may be augmented by the increase in population, or by a town or city springing up in the territory traversed by the road." In Malone *v.* City of Toledo, 28 Ohio St. 643, a strip of land 100 feet wide in the city of Toledo was appropriated for use as a canal. Thereafter this strip was transferred by the state to said city in pursuance of an act of the legislature which authorized the city to enter upon, improve, and occupy said premises as a public highway, and for the use of water pipes for sewerage purposes. In a suit, by one claiming to own a portion of said tract, to enjoin the city from interfering with his possession, it was held that, a canal and street being public highways, the uses of either were of a public nature and of a like kind, and that the use of the

canal for water pipes and sewers was not inconsistent with that to which it had been originally applied. To the same effect, see Crooke *v.* Waterworks Co., 29 Hun,245; Cummins *v.* City of Seymour, 79 Ind. 491. The change of a road to a street renders the adjacent property liable to assessment for improvement to which it was not exposed under existing law prior to the change, and this presents the question whether such burden constitutes an additional servitude, for which compensation must be made. Mr Mills, in his work on Eminent Domain (Section 34), says: "A change from a highway to a turnpike charging toll is not such an essential change as to require compensation to adjoining owners. When a highway is taken for a turnpike, it does not cease to be a highway, and the land does not revert to the owner. The payment of tolls to the turnpike company is in lieu of payment of taxes to support the road. The change is only a change of mode in sustaining the road, and not a change of use." See, also, Elliott, Roads & S. 161; Cooley, Const. Lim. *546; Benedict *v.* Goit, 3 Barb. 459; Walker *v.* Caywood, 31 N. Y. 51; Wright *v.* Carter, 27 N. J. Law, 76; Douglass *v.* Turnpike Co., 22 Md. 219; Callison *v.* Hedrick, 15 Grat. 244; Turnpike Co. *v.* Bishop, 11 Vt. 198; Carter *v.* Clark, 89 Ind. 238; Road Co. *v.* Cane, 2 Ohio St. 419; Malone *v.* City of Toledo, *supra*, Com. *v.* Wilkinson, 16 Pick. 175; Murray *v.* Commissioners, 12 Metc. (Mass.) 455. The right to compensation being founded upon a change in the use, and not upon an alteration in the manner of maintaining the highway, the assessment of benefits for the improvement of the street does not constitute such an additional taking of private property for public use, within the meaning of the organic act, as to necessitate compensation therefor. To hold that plaintiff is entitled to compensation by reason of the change in the method of keeping the highway in repair would be equivalent to maintaining that the legislative assembly could not alter the mode of collecting road taxes after the highway was once established,—a mere

Same—Whether Additional Servitude.

statement of which shows the fallacy of the argument. JUDGE ELLIOTT, in his work on Roads and Streets (page 315), in discussing this subject, says: "If we have not reasoned ill, a suburban servitude may not only be greatly augmented, but, in a measure, transformed, by the demand of the public welfare. This conclusion has for its foundation the old maxim, 'That regard be had for the public welfare, is the highest law'; and it receives support from the principle that men are presumed, when they do an act, to contemplate the natural consequences which may result. It is also true that the benefit which the owner of the servient estate receives from the increase in population and the building up of cities far more than compensates him for the increased burden of the servitude which these things produce, so that he suffers no damages, and without damages there can be no right of action."

Same—Construction of Charter.

The rule is well settled that the remedy prescribed by statute for the condemnation of private property for a public use must be strictly pursued, or the appropriation may be enjoined; for no prerogative of sovereign power should be watched with greater vigilance than that which takes the property of the individual, and devotes it to a public use. Commissioners *v.* Humphrey, 47 Ga. 565; Dyckman *v.* Mayor, etc., 5 N. Y 434. In the light of this rule, we will examine sections 90 and 98 of the charter, to ascertain, if possible, the legislative intent with reference to the manner to be pursued by the council in changing a road to a street. It will be remembered that section 90 requires the council to "cause the city surveyor to survey such proposed new street or extension or line to which the width is to be changed or straightened"; thereby impliedly, at least, declaring it to be unnecessary to survey a public road already in existence within the limits of the city, since such highway, on being changed from a road to a street, is not thereby rendered a "new" street to be opened or widened, a "new" extension to be laid out or established, or a "new" line. Section 98 authorizes the council "to open,

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establish and locate streets upon the road-bed of, and upon or across any county road or public highway within the corporate limits of the city of Eugene"; and construing, as we must, section 90 and 98 *in pari materia*, it is quite apparent that the legislatlve assembly intended that the provisions of section 90, *supra*, should only be invoked when a "new" street is to be opened or widened, a "new" extension to be laid out, or a "new" line established, except when, in changing from a road to a street, additional property is required to be appropriated, or a new use is to be imposed upon the right already acquired. In the change made, no more land was taken, no different title acquired, and no alteration in the use effected; and, such being the case, the legislative assembly was not obliged to provide for a new condemnation, in view of which we are led to believe that the council, by adopting the ordinance referred to, accepted the terms of the grant, and changed the road into a street, under the provisions of section 98, and that section 90 relates to the opening of streets where no highway theretofore existed, or where a material change in the use is contemplated, and that the attempt in the case at bar to pursue the method prescribed in section 90 was unnecessary; and hence the decree is affirmed.

NOTES.

Streets and Highways—Effect of Common-Law Dedication. — In the case of roads and streets, by a common-law dedication the public acquires only a right of passage; and the owner of the fee may exercise all the rights of ownership not inconsistent with the purposes of the dedication. Lade *v.* Shepherd, 2 Stra. 1004; St. Mary *v.* Jacobs, L. R. 7 Q. B. 47, 25 L. T. 80; Goodtitle *v.* Alker, 1 Burr. 133; Harrison *v.* Parker, 6 East 154; Every *v.* Smith, 26 L. J. Exch. 344; Perry *v.* New Orleans, etc., R. Co., 55 Ala. 413, 28 Am. Rep. 740; Maywood Co. *v.* Maywood, 118 Ill. 61; Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25; Manly *v.* Gibson, 13 Ill. 308; Freedom *v.* Norris, 128 Ind. 377; Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358; Des Moines *v.* Hall, 24 Iowa 234; Campbell County Ct. *v.* Newport, 12 B. Mon. (Ky.) 540; Perley *v.* Chandler, 6 Mass. 454, 4 Am. Dec. 159; Boston

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v. Richardson, 13 Allen (Mass.) 152; White *v.* Godfrey, 97 Mass. 472; Bliss *v.* Ball 99 Mass. 597; St. Anthony Falls Water Power Co. *v.* King Wrought-Iron Bridge Co., 23 Minn. 186; Cummings *v.* St. Louis, 90 Mo. 259; Cohoes *v.* Delaware, etc., Canal Co., 134 N. Y. 397; Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Jackson *v.* Hathaway, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; Verplanck *v.* New York, 2 Edw. Ch. (N. Y.) 220; Still *v.* Lansingburgh, 16 Barb. (N. Y.) 107; Charleston Rice Milling Co. *v.* Bennett, 18 S. Car. 254; Pomeroy *v.* Mills, 3 Vt. 279, 23 Am. Dec. 207; Abbott *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222; Benn *v.* Hatcher, 81 Va. 25, 59 Am. Rep. 645; Milwaukee *v.* Milwaukee, etc., R. Co., 7 Wis. 85.

Rural Highways Distinguished from Streets.—The streets of a town are fairly subject to many purposes to which a highway in the country would not be. Haight *v.* Keokuk, 4 Iowa 214. And see Bloomfield, etc., Natural Gas Light Co. *v.* Calkins, 62 N. Y. 386, where the court emphasizes the distinction between urban and rural highways in respect to the right to lay pipes thereon, saying: "It may be urged with some apparent reason that the appropriation of land for a street in a city carries with it the idea that it is to be used for all necessary purposes, as such street, which the interest of the public, and the comfort, enjoyment, or the health of the locality, may demand. Concede, then, that these improvements were proper for cities, it by no means follows that the appellant had a right to use the highway in question for the same purpose, and that, as a necessary result of the reasoning, the gas pipes may be properly laid over the land of the respondent. And it may be remarked that most of the cases cited, if not all of them, state or assume that there is a distinction between the street of a city and a highway in the country. Every one of the improvements referred to may, in cities, be considered as a necessary incident to the public right to repair, improve, increase the value of property, and add to its beauty and the wealth of a large local population. Usually constructed without objection, they do not ordinarily interfere with other rights which have been lawfully acquired and enjoyed, and they confer many advantages which counterbalance any supposed detriment or injury. Whether these rights can be strictly maintained as to cities it is not necessary to determine in this case. It is enough to say that the rule claimed has no application to a country highway, because the circumstances are entirely different. Nor does the rightful use of land appropriated for a street for the purposes before stated in any way disturb the position that a public highway in the country stands entirely upon a different footing." See also this distinction drawn in Chesapeake, etc., Telephone Co. *v.* Mackenzie, 74 Md. 36; Eels *v.* American Telephone, etc., Co., 143 N. Y. 133, *affirming* 65 Hun (N.

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Y.) 516; Kincaid *v.* Indianapolis Natural Gas Co., 124 Ind. 577, 19 Am. St. Rep. 113.

But in Cater *v.* Northwestern Tel. Exch. Co. (Minn., 1895), 63 N. W. Rep. 111, this view is attacked by MITCHELL, J., in delivering the majority opinion, where he says, speaking of telephone poles in the highway: "So far as there is any distinction between rural and urban highways, there would be much more reason for holding such structures and additional servitude in the latter than in the former. It is a matter of common knowledge that telegraph and telephone lines along the side of a country road rarely, if ever, appreciably interfere with either public travel or the easements of the abutting landowner; whereas, in the cities, especially on business streets, where the buildings extend out to the line of the street, the numerous wires stretched upon the crossings frequently materially interfere with access, light, and air, as well as render protection of the buildings more difficult in case of fire."

Rights of Rural Abutter More Extensive than Rights of Urban Abutter.—In Chesapeake, etc., Telephone Co. *v.* Mackenzie, 74 Md. 36, the court said: "The use to which streets in a town or city may be lawfully put are greater and more numerous than in the case of an ordinary road or highway in the country. With reference to the latter, as we have just observed all the public acquires is the easement of passage and its incidents; and hence the owner of the soil parts with this use only, retaining the soil, and by virtue of this ownership is entitled, except for the purposes of repair, to the earth, timber, and grass growing thereon, and to all minerals, quarries, and springs below the surface. But with respect to streets in populous places the public convenience requires more than the mere right of way over and upon them. They may need to be graded, and therefore the municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street, and may make culverts, drains, and sewers upon or under the surface. Pipes may also be laid under the surface when required by the various agencies adopted in civilized life, such as water, gas, electricity, steam, and other things capable of that mode of distribution." See also Kincaid *v.* Indianapolis Natural Gas Co., 124 Ind. 577, 19 Am. St. Rep. 113, quoted above; Eels *v.* American Telephone, etc., Co., 143 N. Y. 133, *affirming* 65 Hun (N. Y.) 516; Elliott on Roads and Streets, c. 18, pp. 299, 203.

STRATFORD

v.

CITY OF GREENSBORO *et al.*

(*Supreme Court of North Carolina, March 7, 1899.*)

Eminent Domain—Streets—Individual Contributing to Cost.—Land taken for street purposes is taken for a public use, and the fact that an individual pays part of the damages of condemnation is immaterial in this connection.

Same—Municipal Powers—Jurisdiction.—Where municipal authorities are empowered by charter or general law to exercise the right of eminent domain for street purposes, their conclusion as to the expediency of doing so is conclusive, as it is the determination of a political, and not a judicial, question.

Same—Same—Same.*—But whether the purpose for which they propose to exercise the right of eminent domain is a public use is a judicial question, which can be finally decided only by the courts.

Ultra Vires—Rights of Taxpayers.†—Where municipal authorities have taken private property for private use under the claim of exercising the right of eminent domain, a resident taxpayer, although not the owner of such property, may have such taking judicially declared *ultra vires*, in order to save himself from illegal taxation on account of the undertaking for which the property was appropriated.

Same—Same.—In an action by a taxpayer to have such a transaction declared *ultra vires* and invalid, it is not necessary that plaintiff should either allege or prove fraud.

Same—Question for Jury.—In such an action, where there is evidence tending to show that the substantial benefit arising from the taking of private property by a city under the claim of exercising the right of eminent domain accrued to an individual, and the benefit to the city was only incidental and purely prospective, it is error to direct for defendants.

APPEAL by plaintiff from Guilford county superior court. *Reversed.*

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*See note at end of case.

†See *note*, p. 142, *ante et seq.*

Stratford *v.* City of Greensboro

J. T. Morehead, for appellant.

Bynum & Taylor, *R. R. King*, and *Shaw & Scales*, for appellees.

Case Stated.

MONTGOMERY, J. At the time of the commencement of this action the defendant Cone was the owner of about 1,600 acres of land (less that part of it which he had sold to the Cone Export & Commission Company of New York, in which company he was a stockholder), situated on the north and northeast of the city of Greensboro, and lying partly within the corporate limits of the city; that part lying within the city limits containing between 300 and 500 acres. That property was connected with the city by the street, Summit avenue. On the 21st and 24th days of January, 1896, the board of aldermen of Greensboro made an order that a portion of Church street be widened, and then extended as a new street from Lindsay street, in a northeasterly direction, to and on the line of Summit avenue, and then over said avenue, as at first laid out, to the corporate limits of the city, and that the strip of land necessary for the street be condemned according to law. On the 7th of February following, the board made an order providing for the borrowing of a sum of money not exceeding $15,000 for the purpose of opening and building the streets referred to in the orders of the 21st and 24th days of January, 1896, and repairing other streets, and other public improvements in the city, and also for an election to be held for the purpose of submitting the question of the creation of the debt to the qualified voters of the city. The plaintiff, a resident and taxpayer of Greensboro, brought this action to have these orders made by the board declared *ultra vires* and void, that the defendant board of aldermen be perpetually enjoined and restrained from holding the election and from opening the streets, and that defendant Cone be restrained from lending to his co-defendant, the city of Greensboro, the money with which to grade and macadamize, curb and bridge, the street to be called "Summit Avenue." In the complaint the plain-

tiff alleged that the opening and making of the new street and the widening of Church street were not necessary and not required for the public use of the city, but, on the contrary, thay they were to be made for the private use and benefit of defendant Cone, that such benefits as might accrue to the city were only incidental, and that the aldermen had entered into a contract with defendant Cone to make the orders concerning the opening of the streets, by which many private advantages would accrue to him, upon his paying to the owners of the condemned lands the assessed or agreed damages, all of which are set out in paragraph 5 of the complaint, which is in the following language: "That in order to carry out his wishes of improving his property outlying the city limits, and other personal and private advantages to be gained thereby, he and his co-defendant, the city of Greensboro, acting through its mayor and aldermen, have entered into a contract in which it is agreed that Cone shall pay for the right of way over the land of the property holders, except that of the First Presbyterian Church, over which said proposed Summit avenue will run, to build ten houses (whether cheap cottages for operatives, or other kind of houses, the plaintiff does not know, as nothing in said contract discloses) on his property lying within the city limits, and to move to Greensboro the offices of the Cone Export & Commission Company, a foreign corporation, which pays no taxes to the state, county, or city, and to lend to the city money sufficient (at 6 per cent. per annum, payable semiannually) to perform its part of the contract; and the city is to at once grade and macadamize, ditch and curb, said street, from North Elm street to the corporate limits, and to build an iron bridge over the track of the Southern Railway, which said street crosses." The plaintiff further alleged that the defendant city was not authorized in law to take the property of its citizens for private use, although by such a course incidental benefit might accrue to the city, and that all of the acts done and threatened to be done under the orders of the board made in reference to the opening and widening

of these streets were *ultra vires*. The judgment prayed for by plaintiff was that the alleged contract, and the action of the board in condemning the lands for the new street, be declared unlawful and *ultra vires*, that its action looking to the borrowing of money from Cone for the purposes alleged in the complaint is unlawful, and that defendants be restrained from further proceedings in the matter. In their several answers the defendants aver that the proceedings of the board were in good faith, that the opening of the new street and the widening of Church street were necessary and for the public benefit, and that of these matters the determination of the board was final. In the answer of the city, however, to paragraph 5 of the complaint, the contract alleged by the plaintiff as having been made between the city and Cone is denied out and out, while Cone in his answer avers that the contract was made as set out by the plaintiff in paragraph 5 of the complaint, and that he was ready then to comply with it in every respect. This contradiction in the two answers is so apparent as to attract attention. If it was the only fact connected with the transaction in reference to the connection Cone had with the enterprise, the contract would not be material. There can be no objection to the contributing of an individual to the expense of laying out or altering a street, nor will such an act prove that the property was taken for the accommodation of private individuals, and not for public use. If, in point of fact, the public necessity and convenience require the improvement of a street, or the opening of one, it can make no difference who pays the damages of condemnation. It might be that a party contributing a part or the whole of the assessed damages in the condemnation of land for a public street, when the public necessity requires such street, might have lands adjacent which might be improved by the opening of the street; and surely, if nothing else appeared, it would not be either immoral or illegal for him to pay the damages growing out of the condemnation proceedings.

Eminent Domain—Streets—Individual Contributing to Cost.

Chicago, B. & Q. R. Co. *v.* City of Naperville (Ill. Sup.) 48 N. E. 335; Parks *v.* Boston, 8 Pick. 218. But the contradiction in the answers was significant.

The following were the issues submitted to the jury: "(1) Was the resolution passed by the board of aldermen of the city of Greensboro at its meeting on the 21st day of January, 1896, for the purpose of widening Church street and opening Summit avenue, the result of a colorable collusion between said board and Caesar Cone or any other person? (2) Has said street been opened? (3) Has the money, to restrain the borrowing of which this suit was instituted, been borrowed?" The plaintiff excepted to the issues. The exception to the first issue ought to have been sustained. It was framed on the view that in all cases where municipal authorities proceed to open and build new streets, having authority so to do in their charter or general law, such proceedings cannot be made the subject of judicial investigation, except in cases of actual fraud. That is an erroneous view of the law in such cases. In cases where the municipal authorities are empowered by the general law or by their charters, as in this case, to open up, grade, and pave streets, the expediency or necessity of doing so, and the power of exercising the right of eminent domain, condemning the private property of the citizen for that purpose, are entirely within the determination of the corporate body, and their action is conclusive against judicial interference, since such a question is not judicial; it is political. 2 Dill. Mun. Corp. § 600. "When the use is public, the necessity of expediency of appropriating any particular property is not a subject of judicial cognizance." Lewis, Em. Dom. § 238; Boom Co. *v.* Patterson, 98 U. S. 403; Brodnax *v.* Groom, 64 N. C. 244; Vaughn *v.* Commissioners, 117 N. C. 434, 23 S. E. 354. It is also true that municipal authorities, when lawfully exercising the power of condemning private lands for the public use, do and must determine, in the first instance, that the use to which they intend the land is a public use. But that decis-

Same—Municipal Powers—Jurisdiction.

ion is not conclusive. But whether the use of the property which the delegated legislative authority has declared to be a public use be such a use as would sustain the authorities in taking, against the will of the owner, his property, is a judicial question. If the taking be in fact for the purposes of private use,—if the basis of condemnation be the benefit of an individual, and not the public interest and convenience,—the courts cannot be concluded by the action of legislative authority from exercising jurisdiction in determining whether the use is a public use, or one for private gain and advantage. 2 Dill. Mun. Corp. § 600; Call *v.* Town of Wilkesboro, 115 N. C. 337, 20 S. E. 468. "All the courts, we believe, concur in holding that whether a particular use is public or not, within the meaning of the constitution, is a question for the judiciary." Lewis, Em. Dom. § 158; Cooley, Tax'n, 110, 120; Clee *v.* Sanders, 74 Mich. 692, 42 N. W. 154.

Same—Same—Same.

But the defendants contend that, even if the question whether the use for which private property has been taken is a public use is a matter for judicial determination, the plaintiff is not the proper person to raise that question, for the reason that he was not the owner of any part of the land taken by the defendant corporation in the opening of the streets, and therefore he has suffered no injury on account of that proceeding. It is certain, however, that in cases where the board of aldermen of a town or city have taken private property for private use under the claim of exercising the right of eminent domain for the public use, a resident taxpayer may have his remedy in the courts against the proceedings, and may have them declared *ultra vires* and void, thereby saving himself from the imposition of unjust and unlawful taxes that would be required to meet the expenses of such unlawful proceedings. If such rights were denied to exist against municipal corporations, taxpayers and property owners who bear the burdens of government would not only be without remedy, but

Ultra Vires—Rights of Taxpayers.

be liable to be plundered whenever irresponsible men might get into the control of the government of towns and cities. In Crampton *v.* Zabriskie, 101 U.S. 601, MR. JUSTICE FIELD said, in delivering the opinion of the court, that: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county,—of the illegal creation of a debt which they, in common with other property holders of the county may otherwise be compelled to pay,—there is at this day no serious question. The right has been recognized by the state courts in numerous cases, and from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would be eminently proper for courts of equity to interfere, upon the application of the taxpayers of the county, to prevent the consummation of a wrong, when the officers of these corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or the county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate power. * * *" In Mayor, etc., *v.* Gill. 31 Md. 375, it was held that resident taxpayers could restrain the corporation and its officers from taking steps to carry out a city ordinance creating a debt and a violation of the constitution.

In the case before us, the main question raised by the pleadings was whether the use to which the new street and improvements were to be devoted was a public use. It was not necessary on the part of the plaintiff to allege or prove actual fraud in the transaction. If the substantial benefit was for the defendant Cone as an individual, and the benefit to the city only incidental and purely prospective, then the proceedings of the board were *ultra vires* and void. An issue should therefore have been

Same—Same.

submitted as to whether the action of the board in making the orders and carrying them out was for the public benefit, and whether the lands condemned were for the public use; and upon that issue the court should have instructed the jury in the law as to what constitutes a public use. In addition, the language of the issue that was submitted was doubtful as to its meaning, and it was submitted without instruction, except that, if the jury believed the plaintiff's evidence, they should answer it "No." There was evidence of the plaintiff going to show that the basis of the orders and acts of the board of aldermen was the private benefit of Cone, and the instruction was erroneous, even if the issue had been properly framed and submitted. Same—Question for Jury.

There was error, for which there must be a new trial. New trial.

NOTES.

Eminent Domain—Necessity and Expediency.—It is well settled that, in the absence of constitutional or statutory provisions to the contrary, the question of the necessity, propriety or expediency of resorting to the exercise of the power of eminent domain is a political one.

United States.—Shoemaker *v.* U. S., 147 U. S. 282; U. S. *v.* Oregon R., etc., Co., 16 Fed. Rep. 524; De Varaigne *v.* Fox, 2 Blatchf. (U. S.) 95; Bonaparte *v.* Camden, etc., R. Co., Baldw. (U. S.) 205; Secombe *v.* Milwaukee, etc., R. Co., 23 Wall. (U. S.) 109.

Alabama.—Sadler *v.* Langham, 34 Ala. 327; Steele *v.* County Com'rs, 83 Ala. 304; Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & P. (Ala.) 190. 23 Am. Dec. 307.

California.—Stockton, etc., R. Co. *v.* Stockton, 41 Cal. 147; Consolidated Channel Co. *v.* Central Pac. R. Co., 51 Cal. 269; Lindsay Irrigation Co. *v.* Mehrtens Co., 97 Cal. 676; Moran *v.* Ross, 79 Cal. 159; Mahoney *v.* Spring Valley Water Works Co., 52 Cal. 159; Napa Valley R. Co. *v.* Napa County, 30 Cal. 437; Wulzen *v.* San Francisco, 101 Cal. 15, 40 Am. St. Rep. 17; Gilmer *v.* Lime Point, 18 Cal. 229.

Delaware.—Wilson *v.* Baltimore, etc., R. Co., 5 Del. Ch. 524; Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411.

Georgia.—Loughbridge *v.* Harris, 42 Ga. 501; Parham *v.* Justices, 9 Ga. 341; Mims *v.* Macon, etc., R. Co., 3 Ga. 333.

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Illinois.—Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449; Chicago, etc., R. Co. *v.* Lake, 71 Ill. 333; Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506; Smith *v.* Chicago, etc., R. Co., 105 Ill. 511; Dunham *v.* Hyde Park, 75 Ill. 371; Hyde Park *v.* Oakwoods Cemetery Assoc., 119 Ill. 141; Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586; Sholl *v.* German Coal Co., 118 Ill. 427, 59 Am. Rep. 379; O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 152.

Indiana.—Indianapolis Water-Works Co. *v.* Burkhart, 41 Ind. 364; Consumers' Gas Trust Co. *v.* Harless, 131 Ind. 446; Farneman *v.* Mount Pleasant Cemetery Assoc., 135 Ind. 344.

Iowa.—Bankhead *v.* Brown, 25 Iowa 540; Cherokee *v.* Sioux City, etc., Town Lot, etc., Co., 52 Iowa 279; Phillips *v.* Watson, 63 Iowa 32.

Kansas.—Jockheck *v.* Shawnee County, 53 Kan. 780; Challiss *v.* Atchison, etc., R. Co., 16 Kan. 117.

Maryland.—New Cent. Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 538.

Massachusetts.—Haverhill Bridge *v.* Essex County, 103 Mass. 120, 4 Am. Rep. 518; Lynch *v.* Forbes, 161 Mass. 302, 42 Am. St. Rep. 402; Com. *v.* Essex Co., 13 Gray (Mass.) 239; Boston Water-Power Co. *v.* Boston, etc., Corp., 23 Pick. (Mass.) 360; Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1; Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474; *In re* Wellington, Petitioner, 16 Pick. (Mass.) 87, 26 Am. Dec. 631; Hingham, etc., Bridge, etc., Corp. *v.* Norfolk County, 6 Allen (Mass.) 353; Talbot *v.* Hudson, 16 Gray (Mass.) 417; Dingley *v.* Boston, 100 Mass. 558; Moore *v.* Sanford, 151 Mass. 285.

Minnesota.—Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155; State *v.* Rapp, 39 Minn. 65; Milwaukee, etc., R. Co. *v.* Faribault, 23 Minn. 167.

Missouri.—Cape Girardeau *v.* Houck, 129 Mo. 607; State *v.* Engelmann, 106 Mo. 628; Simpson *v.* Kansas City, 111 Mo. 237; Musick *v.* Kansas City, etc., R. Co., 114 Mo. 309; Aldridge *v.* Spears, 101 Mo. 400; Dickey *v.* Tennison, 27 Mo. 373; Kansas City *v.* Baird, 98 Mo. 215; County Ct. *v.* Griswold, 58 Mo. 175; St. Louis, etc., R. Co. *v.* Hannibal Union Depot Co., 125 Mo. 82; North Missouri R. Co. *v.* Gott, 28 Mo. 540.

Nebraska.—Welton *v.* Dickson, 38 Neb. 767, 41 Am. St. Rep. 771; Paxton, etc., Irrigating Canal, etc., Co. *v.* Farmers', etc., Irrigation, etc., Co., 45 Neb. 884, 50 Am. St. Rep. 585.

Nevada.—Dayton Gold, etc., Min. Co. *v.* Seawell, 11 Nev. 394.

New Hampshire.—Concord R. Co. *v.* Greeley, 17 N. H. 47.

New Jersey.—Olmsted *v.* Morris Aqueduct, 47 N. J. L. 311; Tide-Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634; Coster *v.* Tide-

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Water Co., 18 N. J. Eq. 54; Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475; Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

New York.—Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45, 22 Am. Dec. 679; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Matter of Townsend, 39 N. Y. 171; Harris *v.* Thompson, 9 Barb. (N. Y.) 350; Bloomfield, etc., Natural Gas-Light Co. *v.* Richardson, 63 Barb. (N. Y.) 437; Matter of Union Ferry Co., 98 N. Y. 139, 13 Am. & Eng. Corp. Cas. 383; People *v.* Smith, 21 N. Y. 597; Matter of Deansville Cemetery Assoc., 66 N. Y. 569, 23 Am. Rep. 86; Varick *v.* Smith, 5 Paige (N. Y.) 137, 28 Am. Dec. 417; Heyward *v.* New York, 7 N. Y. 325; Hartwell *v.* Armstrong, 19 Barb. (N. Y.) 166; Syracuse *v.* Stacey, 86 Hun (N. Y.) 441; Baffalo, etc., R. Co. *v.* Brainard, 9 N. Y. 100; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. (N. Y.) 9, 31 Am. Dec. 313; People *v.* Budd, 117 N. Y. 25, 15 Am. St. Rep. 460; Waterloo Woolen Mfg. Co. *v.* Shanahan, 128 N. Y. 345

North Carolina.—Call *v.* Wilkesboro, 115 N. Car. 337.

Ohio.—Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308.

Oregon.—Dalles Lumbering Co. *v.* Urquhart, 16 Oregon 67.

Pennsylvania.—Smedley *v.* Erwin, 51 Pa. St. 445; Palairet's Appeal, 67 Pa. St. 479, 5 Am. Rep. 450; Pittsburgh *v.* Scott, 1 Pa. St. 309.

Tennessee.—Memphis Freight Co. *v.* Memphis, 4 Coldw. (Tenn.) 419; Anderson *v.* Turbeville, 6 Coldw. (Tenn.) 150.

Vermont.—Tyler *v.* Beacher, 44 Vt. 649, 8 Am. Rep. 398; Williams *v.* School Dist. No. 6, 33 Vt. 271.

Virginia.—Alexander, etc., R. Co. *v.* Alexander, etc., R. Co. 75 Va. 780, 40 Am. Rep. 743; DeVoss *v.* Richmond, 18 Gratt. (Va.) 338, 98 Am. Dec. 647; Tate *v.* Central Lunatic Asylum, 84 Va. 271; Roanoke City *v.* Berkowitz, 80 Va. 616.

West Virginia.—Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812; Varner *v.* Martin, 21 W. Va. 534. *Compare* Valley City Salt Co. *v.* Brown, 7 W. Va. 191.

Wisconsin.—Smith v. Gould, 59 Wis. 641; State *v.* Stewart, 74 Wis. 630; Smeaton *v.* Martin, 57 Wis. 364; Wisconsin Water Co. *v.* Winans, 85 Wis. 26, 39 Am. St. Rep. 813.

Compare Ryerson *v.* Brown, 35 Mich. 333, 24 Am. Rep. 564; Williams *v.* Judge, 45 La. Ann. 1297; Lecoul *v.* Police Jury, 20 La. Ann. 308; Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259.

When the legislature has indicated the existence of what is acknowledged to be a public use; has declared the necessity of the taking for that use, and its extent; has restricted the taking to the extent declared; and has provided for the ascertaining and due pay-

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ment of just compensation, the judicial power may not question its decision. It is only when the limits have been exceeded, or its authority has been abused or perverted, that the judiciary may restrain. Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Hazen *v.* Essex Co., 12 Cush. (Mass.) 477.

Same—Question of Public Use.—The question whether the purposed use is public is for the judiciary.

United States.—Shoemaker *v.* U. S., 147 U. S. 282.

Alabama.—Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; Sadler *v.* Langham, 34 Ala. 311.

California.—Napa Valley R. Co. *v.* Napa County, 30 Cal. 435; Stockton, etc., R. Co. *v.* Stockton, 41 Cal. 147; Consolidated Channel Co. *v.* Central Pac. R. Co., 51 Cal. 269; Mahoney *v.* Spring Valley Water Works Co., 52 Cal. 159; Moran *v.* Ross, 79 Cal. 159; Wulzen *v.* San Francisco, 101 Cal. 15, 40 Am. St. Rep. 17.

Colorado.— Denver Railroad Land, etc., Co. *v.* Union Pac. R. Co., 34 Fed. Rep. 386.

Georgia.—Young *v.* Harrison, 6 Ga. 130; Parham *v.* Justices, 9 Ga. 341; Loughbridge *v.* Harris, 42 Ga. 500.

Illinois.—Chicago, etc., R. Co *v.* Wiltse, 116 Ill. 449; Chicago, etc., R. Co. *v.* Lake, 71 Ill. 333; Hyde Park *v.* Oakwood Cemetery Assoc., 119 Ill. 141; Sholl *v.* German Coal Co., 118 Ill. 427, 59 Am. Rep. 379.

Indiana.—Indianapolis Water Works Co. *v.* Burkhart, 41 Ind. 364.

Iowa.—What is a public use is a question for the courts. Bankhead *v.* Brown, 25 Iowa 540; Cherokee *v.* Sioux City, etc., Town Lot, etc., Co. 52 Iowa 279.

Kansas.—Challiss *v.* Atchison, etc., R. Co., 16 Kan. 117.

Kentucky.—Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259.

Louisiana.—Private property cannot be taken unless for purposes of public utility. What constitutes public utility and purposes is for the courts to determine. Williams *v.* Judge, 45 La. Ann. 1295; Lecoul *v.* Police Jury, 20 La. Ann. 308.

Maryland.—New Central Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537.

Massachusetts.—Talbot *v.* Hudson, 16 Gray (Mass.) 417; Haverhill Bridge *v.* Essex County, 103 Mass. 120, 4 Am. Rep. 518.

Minnesota.—Matter of St. Paul, etc., R. Co., 34 Minn. 227; St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359.

Missouri.—Cape Girardeau *v.* Houck, 129 Mo. 607; State *v.* Engelmann, 106 Mo. 628; Kansas City *v.* Baird, 98 Mo. 215; St. Joseph Terminal R. Co. *v.* Hannibal, etc., R. Co., 94 Mo. 535; Savannah *v.* Hancock, 91 Mo. 54; County Ct. *v.* Griswold, 58 Mo. 175; Dickey *v.* Tennison, 27 Mo. 373; Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129; St. Louis, etc., R. Co. *v.* St. Louis, 92 Mo. 165.

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Nebraska.—Welton *v.* Dickson, 38 Neb. 767, 41 Am. St. Rep. 771; Paxton, etc., Irrigating Canal, etc., Co. *v.* Farmers', etc., Irrigation, etc., Co., 45 Neb. 884, 50 Am. St. Rep. 585.

Nevada.—Dayton Gold, etc., Min. Co. *v.* Seawell, 11 Nev. 394.

New Hampshire.—Concord R. Co. *v.* Greely, 17 N. H. 47.

New Jersey.—Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; Coster *v.* Tide-Water Co., 18 N. J. Eq. 54; Olmsted *v.* Morris Aqueduct, 47 N. J. L. 311.

New York.—Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45, 22 Am. Dec. 687; Varick *v.* Smith, 5 Paige (N. Y.) 160, 28 Am. Dec. 417; Buffalo, etc., R. Co. *v.* Brainard, 9 N. Y. 100; People *v.* Smith, 21 N. Y. 595; Bloomfield, etc., Natural Gas Light Co. *v.* Richardson, 63 Barb. (N. Y.) 437; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Matter of Deansville Cemetery Assoc., 66 N. Y. 569, 23 Am. Rep. 86; Matter of Niagara Falls, etc., R. Co., 108 N. Y. 375; Pocantico Water Works Co. *v.* Bird, 130 N. Y. 249; Harris *v.* Thompson, 9 Barb. (N. Y.) 350; Citizens' Water-Works Co. *v.* Parry, 59 Hun (N. Y.) 202.

North Carolina.—Call *v.* Wilkesboro, 115 N. Car. 337.

Ohio.—McQuillen *v.* Hatton, 42 Ohio St. 202.

Pennsylvania.—Pittsburgh *v.* Scott, 1 Pa. St. 309; Sterling's Appeal, 111 Pa. St. 35, 56 Am. Rep. 246; Edgewood R. Co.'s Appeal, 79 Pa. St. 257; Smedley *v.* Erwin, 51 Pa. St. 445.

Tennessee.—Anderson *v.* Turbeville, 6 Coldw. (Tenn.) 150.

Vermont.—Tyler *v.* Beacher, 44 Vt. 648, 8 Am. Rep. 398.

Virginia.—Roanoke City *v.* Berkowitz, 80 Va. 616.

West Virginia.—Pittsburg, etc., R. Co. *v.* Benwood Iron-Works, 31 W. Va. 710; Varner *v.* Martin, 21 W. Va. 534; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

Wisconsin.—Wisconsin Water Co. *v.* Winans, 85 Wis. 26, 39 Am. St. Rep. 813; Smeaton *v.* Martin, 57 Wis. 364; Smith *v.* Gould, 59 Wis. 641; State *v.* Stewart, 74 Wis. 630.

RITZ

v.

CITY OF WHEELING.

(*Supreme Court of Appeals of West Virginia, Nov. 23, 1898.*)

Directing Verdict.—When, upon the facts conceded as shown, a verdict for the plaintiff would be against law, the court should, on motion, exclude the plaintiff's evidence, and direct a verdict for the defendant. So it is also where, if the essential facts claimed to be proven by the evidence were proven, a verdict for plaintiff would be justified by the law, yet the evidence does not appreciably tend to prove them, but so plainly fails to do so that two reasonable men should not differ as to its insufficiency.

Child Drowned in City Reservoir—Negligence—Liability of City.* —A landowner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is a child does not raise a duty where none otherwise exists. Such a trespasser, injured on such premises, cannot recover of the landowner by reason of the unsafe condition of the premises, unless this negligence be so gross as to amount to a wanton injury. Frost *v.* Eastern R. R., 64 N. H. 220, 9 Atl. 790.

(Syllabus by the Court.)

ERROR by plaintiff to Ohio county circuit court. *Affirmed.*

Caldwell & Caldwell, for plaintiff in error.

Henry M. Russell, *Frank W. Nesbitt*, and *S. O. Boyce*, for defendant in error.

Case Stated.

BRANNON, P. Sarah Ritz, a child of less than five years, was drowned in a reservoir maintained by the city of Wheeling to furnish water for public use, and the administrator brought action against the city, and upon the trial the court excluded the whole of the plaintiff's evidence from the jury as insufficient to warrant a verdict, and directed the jury to find for the defendant, and upon

*See note at end of case.

such a verdict gave judgment for defendant, and the plaintiff appeals. The case is not one involving credibility of witnesses, or weight of evidence, or the proper inferences and deductions from evidence, which are matters proper for the consideration of a jury; for the material facts of the case are undisputed, and the case presents simply the question of law whether, upon the facts, a liability rests on the city. The question is, was the city guilty of negligence? Negligence is most frequently a question of mixed law and fact, proper to go before a jury; but, where the facts are such that ordinarily men will not differ about their effect in not showing negligence, it becomes a question of law for the court, not one of fact for the jury, and, if the evidence is not colorably sufficient to show negligence, the court ought to take the case from the jury and direct a verdict against the plaintiff. When the evidence is so clearly deficient as to give no support to a verdict for plaintiff, if rendered, the evidence should be excluded from the jury. Klinkler *v.* Iron Co., 27 S. E. 237, 43 W. Va. 219; 1 Sherm. & R. Neg. (2d Ed.) § 56. Where the case turns on the weight and effect of the evidence in proving or not proving facts necessary to support the action, and the evidence appreciably goes to prove such facts, it ought to go to the jury, as a verdict upon such evidence gives it a force which it might not have with the judge before verdict, and fortifies his case more against the action of the court, as the court cannot set the verdict aside unless plainly and decidedly contrary to or without evidence; but where the case is not such, but one of undisputed or indisputable facts, leaving it only a matter of law whether the facts show a liability on the defendant, the court should take the case from the jury, and direct a verdict, if the evidence shows no case for the plaintiff, because, if there were a verdict for him, it would be a finding against law, and the court always annuls a verdict against law, upon conceded or indisputable facts. It is different, then, from a motion for a new trial, where the verdict rests on the credibility of witnesses or the weight and effect of evidence.

Directing Verdict.

Grayson's Case, 6 Grat. 712; Poling *v.* Railroad Co., 38 W. Va. 645, 18 S. E. 782 (Syl. point 8). Likely this distinction is not always thought of. Plainly, if the court does right in excluding the evidence, it commits no error in directing a verdict, as such a verdict is the inevitable consequence of such exclusion. There cannot then be any different verdict.

Let us see then whether the city is liable. In maintaining the reservoir, the city was engaged in a lawful act, within its power and duty as a municipal corporation,—a governmental act; and I do not see, in the absence of a statute imposing liability, if an open question, how it could be held liable, even if guilty of negligence, under the principle stated in Brown's Adm'r *v.* Town of Guyandotte, 34 W. Va. 299, 12 S. E. 707, and 1 Beach, Pub. Corp. § 749: "Where a city, under authority of a general law, undertakes a work for the sole use and benefit of the public, it is not liable for an injury caused by the negligent or defective act of its servants, unless some statute, either directly or by implication, gives a private remedy. This rule has been applied against a traveler injured by negligent blasting while excavating the foundation of a public school house, and against a child injured by reason of an unsafe staircase of a school house, and a dangerous excavation in a school-house yard. The same rule has been applied in favor of cities in respect to town houses and court houses, and public grounds, like Boston Common. And, it makes no difference, in the application of the rule, whether the injury is caused by a negligent act done in the direct performance of the public work, or is received after the completion of the work." You cannot sue the state for such cause, unless it granted remedy. Why sue a city when performing a governmental function? One citizen is as much guilty of negligence as are others; all are guilty alike. Contrary doctrine holds a city liable as if an individual engaged in private work for private ends. But most authorities oppose this view. The law seems to be that a city or town, in the use of its property, though for purely public purposes, is liable for

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negligence as private owners. Gibson *v.* City of Huntington, 38 W. Va. 177, 18 S. E. 447; 2 Dill. Mun. Corp. § 985; 15 Am. & Eng. Enc. Law. 1141, 1149, 1155. But those authorities hold that, to make a municipal corporation liable for injury received from its use of its property, negligence must be shown. Thus we encounter in this case the question whether the city was guilty of negligence to which we can attribute the death of the little girl. There can be no negligence charged upon a person unless he rests under a duty to the person complaining of damage at his hands; for if there is no duty violated, though there may be grave damage befalling the complaining party, he has no ground of action. It is a case denominated in law as "*damnum absque injuria*,"—damage done, but without violation of a right in the injured party; a misfortune unaccompanied by a breach of duty by the party inflicting the injury. Sherm. & R. Neg. § 8. The reservoir and the land containing it were the private property of the city, and used, not as a park or place of public resort or common, but only for reservoir purposes. The child was a trespasser, if you can say a child can be a trespasser. It was a trespasser, in legal sense; that is, it was on this property without right. The city was not bound to watch it. It could not be liable to it only for willful or wanton injury. I would, as an original question, hold that the law testing this case is laid down in 1 Beach, Pub. Corp. § 754, as follows: "A municipal corporation is not liable to a trespasser who goes, without license or invitation, upon its land, though unmolested, for mere pleasure or to gratify curiosity, and there meets with an injury through the corporation's negligent management of its property; and no distinction is made in favor of an infant child so receiving an injury. In such a case the municipality owes no special duty to a child straying from its parents, and the duty of protecting it is not shifted from its parents to the municipality because it chances to escape from their care. This is the general rule applicable to those who trespass on private lands, and there is no reason why municipal corporations

should not have the benefit of it; but, of course, it has no application to highways, where all have a right to be."

I repeat, this is so, because no legal duty rests on the corporation. Our own cases sustain the doctrine of immunity where there is no duty placed by the law upon the party sought to be charged with damages. By reason of this doctrine, the case of Woolwine's Adm'r *v.* Railway Co., 36 W. Va. 329, 15 S. E. 81, denied relief to a man who visited a telegraph office kept by a railroad company to make a call of friendship on the operator, and was injured by negligence of the railroad's servants. And by reason of this doctrine, in Poling *v.* Railroad Co., 38 W. Va. 645, 18 S. E. 782, no damages were conceded for the death of a person standing on the railroad grounds, and killed by reason of a defective apparatus used to catch mail from a passing train. And by reason of the same doctrine, in Dicken *v.* Coal Co., 41 W. Va. 511, 23 S. E. 582, recovery was denied for the injury or a little child crippled by a car while on a train road of a salt company. Such must be the ruling as long as private ownership in property is recognized, as to hold otherwise would detract from the lawful dominion of a man over his own property, and contravene the canon of property, expressed in the Dicken Case, that "a party who is using his own property in a lawful way cannot be guilty of a breach of duty to any one."

These cases of our own decide the case against the plaintiff, but the importance of the case and briefs of counsel justify reference to other states. In Clark *v.* Manchester, 62 N. H. 577, a child of four years was drowned in a reservoir which had once been used by a city, but its use had ceased, the fence was removed, it was partly filled up, and but a portion yet had water in it. Children played there. A field was near by, where ball playing and other amusements went on. The child, while passing along a path at the reservoir, fell into it. It was held that the city was not, without a statute, liable for neglect of a public corporate duty, and that the city owed no duty to one going upon its land for pleasure

or curiosity, unless the negligence be so gross as to amount to a wanton infliction of injury, and that no distinction is made in favor of an infant. In Grindley *v.* McKechnie, 163 Mass. 494, 40 N. E. 764, a city kept a sewer, and by it a hole had been formed by the action of the water, and was filled with water, the hole being 50 feet from the street, along which was a fence, and some boards had been torn from it, and a path led from this opening to the sewer. A child went through this opening, along the path, to the sewer, and was drowned. It was held that the city owed no duty to the child to keep the sewer or hole in safe condition, and was not liable in damages. Similar decisions, based on principles above stated, are to be found in Murphy *v.* City of Brooklyn, 118 N. Y. 575, 23 N. E. 887; Gillespie *v.* McGowan, 100 Pa. St. 144; Benson *v.* Traction Co., 77 Md. 535, 26 Atl. 973; Charlebois *v.* Railroad Co., 91 Mich. 59, 51 N. W. 812; Moran *v.* Pullman Palace-Car Co. (Mo. Sup.) 36 S. W. 659; Overholt *v.* Vieths, 93 Mo. 422, 6 S. W. 74; Klix *v.* Nieman, 68 Wis. 271, 32 N. W. 223; Dobbins *v.* Railway Co. (Tex. Sup.) 41 S. W. 62; Richards *v.* Connell, 45 Neb. 467, 63 N. W. 915; City of Omaha *v.* Bowman, 52 Neb. 293, 72 N. W. 316; Peters *v.* Bowman, 115 Cal. 345, 47 Pac. 113, 598. They are cases of small children drowning in reservoirs or pools of water, in most instances unprotected by fence, whereas in this instance the reservoir was well fenced. Those cases are apposite to this in similarity of source of injury and character of persons injured. Many cases may be cited of injury from other causes to persons on ground occupied by others. They involve the same principle, regardless of different cause of injury; that is, that the owner of the ground owed no duty to one having no legal right to be upon the ground. Recovery was refused in Gay *v.* Railway Co., 159 Mass. 238, 34 N. E. 186, to a boy 10 years old, who went on a car unlawfully standing in a street, and was injured by a recoiling brake not properly fastened. It was said that, if standing on the company's ground, it would be most clear that the company would not be liable; and, as it was, the

court said that the defendant was not liable. In Railway Co. *v.* Edwards (Tex. Sup.) 36 S. W. 430, an eight year old child in a lot of the company open on one side was crushed by a pile of plank improperly piled. In Talty *v.* City of Atlantic, 92 Iowa, 135, 60 N. W. 516, child was injured by going down path from street, and crushed while digging sand, by a bank caving. It was held that the city was not bound to fence the path. In O'Conner *v.* Railroad Co. (La.) 10 South. 678, children usually played in a block with openings in fence, and one of seven years was injured. In Railroad Co. *v.* Bockoven (Kan. Sup.) 36 Pac. 322, a child of five years was killed while swinging, by a falling gate, which was defective and dangerous. In Ratte *v.* Dawson, 50 Minn. 450, 52 N. W. 965, a child of three years was playing in a pit caused by taking out sand, and wholly unguarded, in a vacant lot, and was killed by a falling embankment left in dangerous condition. Children usually played in the sand, as it was attractive to them. It was held there could be no recovery, as there was no duty on the owner to keep his premises safe. In Barney *v.* Railroad Co., 126 Mo. 372, 28 S. W. 1069, the railroad owned a yard not fenced, where children went to play, and one of six years jumped on a train and was injured. Held no duty to the child was on the company. In Vanderbeck *v.* Hendry, 34 N. J. Law, 467, defendant owned a board yard in a populous part of city, frequented by children, and a child injured by a falling pile of lumber, not in safe condition, was denied recovery, because no duty as to the child rested on the defendant to pile the plank properly. In Clark *v.* City of Richmond, 83 Va. 355, 5 S. E. 369, the city had made excavation on land of another, who had erected a wall along the street, and a child of six years walked on the wall, and fell into the pit. The court said the city owed him no duty, as he went upon property where there was no duty owing him. McGuiness *v.* Butler (Mass.) 34, N. E. 259, denied relief to a child injured by pulling upon himself a slab left by the owner leaning

against his shop, one end in the street and the top a few inches inside his line.

But it is contended that, while this doctrine that no duty lies upon the owner of property to keep it in safe condition as to trespasser applies to persons who have attained years of discretion, the case is wholly different as to children of tender years; that as to them the owner cannot use the property as he chooses, but must so use it as not to injure them. Perhaps this is stating the position of plaintiff's counsel too broadly. The position is that the owner cannot erect or continue on his property and structure, establishment, or machinery that is at the same time in dangerous condition, and calculated to attract and allure young children to it. It must be both to sustain a recovery. This position is sought to be supported by what is called the "Turntable Cases" (Railroad Co. *v.* Stout, 17 Wall. 657, and other cases following it). In that case a boy was injured while playing in a railroad turntable left unlocked, and was allowed a recovery. The case is most unsatisfactory. The opinion is not clear. It seems to go upon the idea, as an element of decision, that to deny a recovery it was necessary to impute contributory negligence to a child; whereas the matter in that case did not, nor does it in this case, involve contributory negligence, which is foreign to our question, which question is whether the defendant owes duty to a child wandering upon the defendant's premises and injured by its lawful works. And in the Stout Case the real point of the decision is that the case should have gone to the jury, rather than a flat decision of defendant's liability, though I do not say it was not involved. But the Stout Case, if carried to the length to which it is sought to be carried, would exact of every property owner the utmost watchfulness, vigilance, and expenditure to guard against hurt to children, else he would be every moment in danger of ruinous damages. It attacks the right of free use of one's property in lawful business. A railroad liable because it happened to leave a turntable unlocked, as turntables often are, on its own track,—a necessary

appliance in a lawful business! Ought a farmer be liable for failing to put a picket fence around his pond necessary for his cattle? If he does not, some little boy will climb the fence into the farmer's field, drown in the pond, and sue the farmer, on the same principle. The dam that contains water to turn the mill wheel, having a path around it shaded with willows, is very alluring to the child and the man. Must the miller inclose it? The canal, with its towpath and frogs, is very attractive to the little boy or girl, and dangerous, too. If a child drown in it, is the company liable? How many more instances of things useful in lawful business, and withal very attractive to children, and very dangerous, might be put? And the rule contended for says that, if the thing causing the injury be attractive or seductive, the liability attends it. How many things are, or may be, so to children? "A child's will is the wind's will." Almost everything will attract some child. The pretty horse, or the bright red mowing machine, or the pond in the farmer's field, the millpond, canal, the railroad cars, the moving carriage in the street, electric works, and infinite other things, attract the child as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness, and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him? As was well said in Gillespie *v.* McGowan, 100 Pa. St. 144, this rule "would charge the duty of the protection of children upon every member of the community except their parents." A very onerous duty! Nolan *v.* Railroad Co., 53 Conn. 462, 4 Atl. 106, holds that the same precautions by property owners apply to infants and adults.

I am guilty of no undue assumption in condemning the Stout Case, as it has received in some courts, the most eminent in the land, open condemnation, and in others criticism tantamount to condemnation; and some which followed it limit its application to its facts or desire to recant. Walsh *v.* Railroad Co., 145 N. Y. 301, 39 N. E. 1068; Frost *v.*

Railroad Co., 64 N. H. 220, 9 Atl. 790; Daniels *v.* Railroad Co., 154 Mass. 349, 28 N. E. 283; Barney *v.* Railroad Co., 126 Mo. 372, 28 S. W. 1069; Railway Co. *v.* Edwards (Tex. Sup.) 36 S. W. 431; Dobbins *v.* Railroad Co. (Tex. Sup.) 41 S. W. 62; Railroad Co. *v.* Bockoven (Kan. Sup.) 36 Pac. 322; Peters *v.* Bowman, 115 Cal. 345, 47 Pac. 113, 598; Catlett *v.* Railway Co., 57 Ark. 461, 21 S. W. 1062; Bishop *v.* Railroad Co., 14 R. I. 320.

Here I may fitly add that the cases cited denying recovery were cases of infants of tender years. Are they all wrong, running through so many years? Is our own Dicken Case wrong? And the Woolwine and Poling Cases? Another reason against applying the Stout Case to mulct the city of Wheeling in damages is that, as often construed, that case only applies to "dangerous machinery." Several courts which followed it have since said it ought to be limited to its particular facts. Whether the distinction between "dangerous machinery" and other means of injury be clear or not, several courts and text writers have made it. Railroad cars held not such "dangerous machines." Barney *v.* Railroad Co., 126 Mo. 372, 28 S. W. 1069; Catlett *v.* Railroad Co., 57 Ark. 461, 21 S. W. 1062. Cars are attractive to children, but the law does not require a guard to keep children from standing cars. Railroad Co. *v.* McLaughlin, 47 Ill. 265.

Now, I do not suppose this reservoir of the city would come under the head of "dangerous machinery." If so, what structure or establishment might not? At any rate, if that is "dangerous machinery," hundreds of necessary things would fall under this head of liability not heretofore regarded as dangerous and attractive to children, and greatly endanger the maintenance of many things necessary in life and business, and be an enormous burden to guard and watch with never sleeping eyes. Strange to me the idea that such a reservoir can be made to come under this rule. And I say that the reservoir is not "dangerous" in that sense. And I say, with yet greater confidence, that it is not specially

"attractive" in that sense. If not, there can be no recovery in this case; for on that narrow ground the case hinges. Hence the Stout Case does not apply.

But a most important matter is, what is the negligence claimed to sustain this action? It is that there was a gate of entry into the inclosure containing the reservoir, which was sometimes open, and that there was an opening under the picket fence several feet deep to allow water coming into the reservoir inclosure from the hill above, from rain, to pass out so as to keep it from entering the reservoir and polluting its water. The reservoir was inclosed with a high, strong picket fence. It does not appear how the child entered the inclosure, but likely through the opening under the fence. Now, most of the cases above will show that the city was not bound to fence, but it did securely fence, the reservoir. It adopted a reasonable precaution, and did all that reasonable care would exact. Do the gate and drain, things indispensable, convict the city of want of ordinary care or gross negligence? Surely not. The place was reasonably safe. Though people and children did sometimes go upon the city land containing the reservoir, and along the narrow path along the fence on the east side over the high, steep ground, almost a precipice of hundreds of feet, to watch games of baseball in a field below, yet there was no invitation by the city to do so. The place was uninviting and dangerous, and there was no ground for the city to anticipate that parents would allow their children there, on very dangerous ground, or that one would crawl under the fence, through this single necessary opening. The city used all due precaution. This opening was at the remote end of the inclosure, away from houses a considerable distance, and at the end of the path. The path was along the fence, was only two feet wide, and very close to the fence, and the whole space between the fence and precipice was only that wide,—a path, not a highway, and unlikely to invite people. It was not bound to use the utmost possible care to guard infallibly against all possible accidents. In Gavin *v.* City of Chicago, 97 Ill. 66,

it was held that the city must keep a bridge in a reasonably safe condition, and that, though it could be made to be free from accident to playing children, yet it was not bound to so construct it as to be safe for children playing upon and around it, or place guards or mechanical contrivances to keep children off the bridge. An owner is not required to provide against remote and improbable injuries to trespassing children. Car Co. *v.* Cooper, 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216, and note. One using his property in a lawful way is not under obligation to save others from inevitable accident. "He performs his duty when he uses reasonable care and precaution." Cosulich *v.* Oil Co., 122 N. Y. 118, 25 N. E. 259. Even if the city owed a duty to the child, it was only of ordinary care. 2 Sherm. & R. Neg. (2d Ed.) § 705.

The city had a watchman there, though by no means was this required, as above authorities show. The watchman was not present or did not happen to see this child. The fact that it did keep a watchman did not bind the the city to duty not fixed by law or a higher degree of duty than the law fixes, if any. The fact shows that the city took all reasonable precautions, and this is an unfortunate, inevitable accident, for which it is not responsible. The South Carolina court stated the point clearly, saying, as to children, that there is a liability only "when, from the peculiar nature and open and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such injury." How can we say in this case that a drain at the end of a narrow fringe of 2 feet, 200 yards long, between a fence and precipice, just where the fence butted up against a high hill cut down in the construction of the reservoir, not where people usually went, very inconvenient to walkers, we may say dangerous, where there was nothing to invite them, but everything to deter, and the common ground, if such, was on the other side of the reservoir inclosure, a good distance and cut off from this point,—the point where the drain emerged being secluded, and the best point for it, and where no one would be expected

to go,—how can we say the city "should reasonably anticipate injury" there, in the language of the South Carolina court? Busw. Pers. Inj. § 77, states the rule, as to children trespassing, to be that, to charge the defendant, it must appear that the act was "willfully mischievous, as by leaving a ferocious dog at liberty," and that it is to be deemed mischievous or wanton only when "the act was done in the ordinary course of his business, and by the use of appliances which do not, obviously and of necessity, expose all persons who may approach them to peril, or the exposure of which is not attended with some concealed danger." That is the test.

Now, would a farmer or millowner be liable because he left a drain under his fence, and a child happened to crawl through it and fall into the pond? Certainly not. It is an unexpected, inevitable accident. Neither is Wheeling liable.

Counsel complain that the court would not allow as evidence a paper to show that the only title the city had to the land containing part of the reservoir was one vested in it in trust as a common, and that it misappropriated it when it devoted a part of it to use for a reservoir. The city had years ago made this reservoir; had been for years in actual use of it for the purpose. It never was used as a common, in the sense of a park. Now, if the party who conferred the land upon the city, or his heirs, could stop its use for a reservoir, or in any manner complain of the act as a misappropriation, or if any one could do so, while the city was in the exclusive, unrestrained occupation of it, for reservoir purposes, it has the right to be looked upon as owner, and entitled to the immunity from damages, like any owner. Its title could not be put in question in this collateral way in this action. I think the paper was irrelevant.

Late reference is made to the case of Rowzee *v.* Pierce (Miss.) 23 South. 307. That was an injunction to prevent a lot conveyed to a town for a park from being used as a site for a school house, and it was held that the use proposed to be made of it was against the purpose of the grant. To me it is plainly not relevant to this case. To restrain a city from

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diverting property to a different use from that contemplated in the grant is one thing; but the question whether it is, while in actual use of the land for such purpose, liable for an act claimed to be a negligent use of the property, which negligence does not consist in the application of the property to a use not contemplated, but in its mere handling of the property, is another question. The question here is whether the act of having the drain renders the city liable, no matter how it came by the land. Would the city be liable if the conveyance to it had been general, and not for a special purpose? I oppose imposing upon the innocent public heavy damages for the accidents and misfortunes which always have and always will attend human existence. The safety of the many is to be preferred to even the suffering and misfortunes of individuals. Judgment affirmed.

NOTE.

Liability of City for Death of Boy Drowned in Hole on Private Land Made by Sewer.—In Murphy *v.* Brooklyn, 118 N. Y. 575, it was held, that where a boy was drowned in a hole alongside of a sewer on private land about fifty or sixty feet distant from street, such hole having been caused by the pressure of sewage from an adjoining sewer, and it appearing that the city was under no obligation to keep the place in a safe condition, the city was not liable. PARKER, J., said: "It has been held that where an owner makes an excavation upon his own land, but so near to the highway as to render travel thereon dangerous, and fails to guard it, he is chargeable with the damages sustained by one who is free from fault. Beck *v.* Carter, 68 N. Y. 283. It may be that in such a case a municipality, having notice of the continuance of the excavation, would be liable because of a failure to erect a guard at the boundary of the street, so as to make the roadway safe. As a general rule, however, the owner has a right to make such use of his land as he pleases; and in the absence of special circumstances, of which Beck *v.* Carter, *supra*, furnishes an illustration, the owner is not liable for injuries sustained by one who goes upon his land, even though permission to cross the premises be given. In such case the licensee takes the risk of accidents resulting from the use of the premises in the condition in which he finds

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them. There is an exception to this general rule. Where the owner, expressly or by implication, invites an individual or the public to come upon his land, he is liable to respond in damages to one who, accepting the invitation, is injured by pitfalls or snares maintained upon the premises. Now, it could not be seriously contended that had the owner been in the sole possession and occupation of the lands in question, and had permitted to exist, or by his own act had created, the hole in question, he would have been chargeable in damages because of the death of the plaintiff's intestate, who, unbidden, came upon his lands. Liability could not be predicated upon the rule laid down in Beck *v.* Carter, *supra*, and kindred cases, because the hole or excavation was neither adjacent to the highway nor so close as to make the highway unsafe or dangerous. On the contrary, it was from 50 to 60 feet therefrom, and separated by an embankment, faced with a wall, and surmounted by a fence. Neither is it pretended that the owner had, expressly or by implication, invited the intestate or the public to go upon his premises. True, the evidence tends to show that one of the crossbars was down at the place where plaintiff's intestate entered upon the lands in question, and that for some 10 or 12 feet in the direction of the hole, which was from 50 to 60 feet away, there appeared to be a trail or path indicating that others had been accustomed to walk over it; and if we assume that divers persons had been accustomed to go upon the land, and cross over it to the shore of the bay, without objection, that fact did not devolve upon the owner the duty of protecting such trespassers, or, at most, licensees, from injury. Clearly, the owner would not be chargeable with negligence in permitting the hole complained of to remain. That which it was lawful for him to do upon his own lands he could permit another to do. It matters not whether that other be an individual or a municipal corporation. The owner, under the circumstances proven, owed no duty to the public in respect to this hole. No more did the occupant, who created it with the consent of the owner. The defendant is not, therefore, chargeable with negligence in permitting its continuance. This conclusion is in accord with the views expressed by JUDGE EARL in a prior review. 98 N. Y. 642. The judgment should be affirmed.

SCHAUF'S ADM'R

v.

CITY OF PADUCAH.

(*Court of Appeals of Kentucky, March 17, 1899.*)

Boy Drowned in Unguarded Pond—Liability of City.*—A boy of seven years of age waded into, and was drowned in a pond situated on land belonging to the city, and caused by an excavation made in digging gravel for the city. The child did not lose his life from the dangerous proximity of the pond to a highway, or from any secret danger, such as a great depth of water near the bank. *Held*, that the city was not liable.

APPEAL by plaintiff from McCracken county circuit court. *Affirmed.*

Thos. E. Moss, for appellant.

L. D. Husbands, for appellee.

HOBSON, J. Some years ago the city of Paducah bought a piece of land outside of the city limits, from which it got gravel. The gravel being removed, a considerable excavation was made, which in the course of time filled with water, and was used as a bathing and fishing place. After this the limits of the city were extended so as to include this pond, which stood out in the commons, and some distance from any highway. Appellant lived in the city, about a mile from the pond. His little son, 7 years of age, went down to visit a relative, living not far from it. While crossing the common, the boy caught a bird, and, seeing some children fishing at the pond, he went over to where they were fishing. The bird got away from him, and fluttered out on the water. The child waded in after the bird. It fluttered out further from him on the water. He, following it, got over his depth, and was drowned, there being no one present large enough

*See Ritz *v.* City of Wheeling (W. Va.), *ante* and *note*.

to pull him out. For this, appellant, as administrator of the child, brought suit against the city, alleging that the death of the child was due to its negligence. At the conclusion of the evidence for appellant the court instructed the jury peremptorily to find for the appellee.

Appellant relies on Branson's Adm'r *v.* Labrot, 81 Ky. 638, as sustaining a recovery in this case. In that case children were allowed to play about a pile of lumber insecurely placed, which, for this reason, fell on a child, and killed it. The court likened the case to that of a man setting a trap upon his premises, and it was on this ground that the judgmeut was rested. But accumulations of water are common about all cities, especially river towns. A large part of the farm houses of this state have ponds about them. The city was under the same obligation as any other lot owner, and no more. The child did not lose his life from the dangerous proximity of the pond to a highway, or from any secret danger, such as a great depth of water near the bank, but from his voluntarily wading out in the pond some 10 feet, after the bird. It was not the duty of the city to provide against such a contingency as this. In Gillespie *v.* McGowen, 45 Am. Rep. 365, a boy 8 years old, while fishing in a well in an old brickyard, fell in it, and was drowned,—a stronger case for the plaintiff than we have here,—yet it was held that there could be no recovery. The court said: "We are unable to see anything in this case to charge the defendants with negligence in not inclosing their lot or guarding the well. There was no concealed trap or deadfall, as in Hydraulic Works Co. *v.* Orr. 83 Pa. St. 332. The well was open, and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this respect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusements. Vacant brickyards and open lots exist on all sides of the city. There are streams and

pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property to inclose it, or fill up their ponds, and level the surface, so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit; yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents." To the same effect, see 2 Shear. & R. Neg. § 715; Bish. Noncont. Law, §§ 845, 854, and cases cited. Judgment affirmed.

CITY OF KANSAS CITY

v.

FILE *et al.*

(*Supreme Court of Kansas, Jan. 7, 1899.*)

Broken Electric Wire—Personal Injuries—Joinder of City and Light Company.*—When an electric light wire in a city breaks and falls down and remains in the street for three weeks, constituting thereby a dangerous obstruction to travel, and causing injury to a passer-by, both the city and the electric light company are presumed from the lapse of time to have knowledge of its condition and dangerous character, and both may be joined in an action for damages for injuries resulting from their negligent omission to cause the wire to be repaired. DOSTER, C. J., dissenting.

*See note at end of case.

City of Kansas City *v.* File

New Trial.—In an action for damages against two joint tort feasors, the court may, after verdict against both, for good cause refuse a new trial to one while allowing it to the other.

(Syllabus by the Court.)

ERROR by defendant from Wyandotte county court of common pleas. *Affirmed.*

G. B. Watson and *T. A. Pollock*, for plaintiff in error.

Dail & Bird, for defendants in error.

DOSTER, C. J. This was an action brought by Grace File, a little girl, against the city of Kansas City, Kan., and the Consolidated Electric Light & Power Company, to recover damages for injuries sustained on account of the negligence of the defendants in allowing one of the conducting wires of the light company to break and fall to the street, and with which, while remaining in the street, and when charged with an electric current, she came in contact. While not pertinent to any legal aspect of the case, it is interesting to note that the broken ends of the wire were about 80 feet apart, one of them lying upon the ground, the other suspended in the air, or, possibly, resting against one of the supporting poles. This breakage in the wire, as electricians explain, and as is common observation, destroyed the continuity of the circuit so far as the usual conducting medium was concerned. However, the electric current was on at the time of the little girl's injuries, and therefore must have been passing between the broken ends of the wire through the earth and the supporting pole spoken of, or through space without any visible conducting medium,—a rare, if not hitherto unobserved, phenomenon, as experts stated. The plaintiff ignorantly and innocently took hold of the end of the wire lying upon the ground, and was severely and permanently injured by the consequent shock. A verdict and judgment were rendered in her favor. The defendants filed separate motions for a new trial. That of the electric light company was sustained; that of the city overruled; and it therefore prosecutes error to this court.

Case Stated.

The first claim of error, and the one principally discussed,

is the misjoinder of the city and the electric light company as defendants. It is contended that the obligation of these two parties to prevent the electric wires from becoming obstructions or agencies dangerous to the people of the city proceeds from different sources; that no relations of contract or of public or municipal policy existed between them making the care of the wires a joint duty; that no obligation rested upon the city to inspect the wires of the electric light company, or to superintend the business of lighting the streets, so as to charge it jointly with the company for damages resulting from the latter's delinquencies. We are, however, constraind to view the rule of practice differently from that taken by the city. There is no question but that separate actions might have been maintained against the defendants and separate judgments recovered. However, but one satisfaction could be had. The policy of the Code is to settle the whole subject-matter of any controversy in one action. This rule of policy is collectible out of several of the sections relating to the joinder of parties and of causes of action. Whatever may have been the rules of practice at common law, the Code, which in legal as well as in equitable actions seeks the adjustment of interrelated controversies in a single suit, lends strong countenance to the joinder of defendants in such cases, if the plaintiff so elects; but, aside from the rules of the Code, and going to the metaphysical question of relationship between the two defendants, there was a community of action, or rather of negligent omission, upon their part. Each was under obligation to see that the electric wire in question did not fall down and remain upon the ground,—the city because of the general oversight of its streets which the law requires it to take, the electric light company because of its obligation to prevent its property from becoming a dangerous menace to the public safety. If it be admitted that these obligations are different, or spring from different sources, they nevertheless concur to one end,—to the end of avoiding, among other and similar consequences, just such injuries as the plaintiff sustained.

Broken Electric Wire—Personal Injuries—Joinder of City and Light Company.

The concurring neglect of these respective obligations produced single consequence, and must therefore be viewed as joint and mutual. The petition alleges that the wire in question broke and remained down for three weeks before the accident occurred. This was time enough to charge the city as well as the company with knowledge of its condition, and from which its concurrent disregard of its duty is plainly to be inferred. Inasmuch as the duty in question rested upon both city and company, and inasmuch as each possessed knowledge of the other's failure to discharge the obligation, it it can fairly be said that each so concurred in the other's negligence as to mutually and jointly with it conduce to the plaintiff's injury.

Error is claimed because of the refusal of the court to grant a new trial to the city, while allowing one to the electric light company. The case against the two defendants was, of course, tried as a single action. What the reason was for awarding a new trial to one while refusing it to the other is not satisfactorily shown by the record. Counsel in argument say the court thought that the evidence of the electric light company's ownership of the line of wire upon which the accident occurred was not satisfactorily established. If so, its action was justifiable. Be that as it may, no legal reason exists why a new trial might not be granted to one defendant and denied the other. The plaintiff could have prosecuted actions against them separately and recovered separate judgments. Neither one had the right to insist upon the joinder of the other with it; and, in fact, as already stated, the city objected to the joinder of the electric light company with it. Inasmuch as separate actions could have been maintained against each of the defendants, neither one of them had the right to insist that the other be retained in the case until final trial and judgment. The plaintiff in error, in support of its position, cites the cases of Raymond *v.* Kiseberg (Wis.) 54 N. W. 612, Everroad *v.* Gerbert, 83 Ind. 489, and Albright *v.* McTighe, 49 Fed. 817. The reasoning of these cases, however, does not

New Trial.

commend itself to us. Many other claims of error are made. We have carefully examined all of them, but do not find any of them well founded. The judgment of the court below is therefore affirmed.

JOHNSTON and ALLEN, JJ., concurring. DOSTER, C. J., dissenting from first paragraph of syllabus and corresponding portion of opinion.

DOSTER, C. J. (dissenting). The views hereinbefore expressed upon the subject of joinder of defendants are those of my associates, not my own. I dissent from them. Ordinarily a mere question of practice is not of sufficient consequence to justify an expression of disagreement with the controlling view. Ordinarily there cannot be much concern how such questions ars settled; the chief concern is to have them settled. But I think I can foresee as a result of the rule declared in this case a confusion of procedure no less harmful in its consequences than that which would follow an erroneous decision upon a matter of substantive legal right. Besides, the error of the ruling made is so obvious that I feel it due to myself to disavow any part in its commission. The bare statement of the rule under consideration shows the mistaken application made of it. That rule is that joint tort feasors may be united as defendants in an action. "Joint" is defined as, "United; combined; done by or between two or more unitedly; shared by or between two or more" (Kinney, Law Dict.); "combined; united; done by or against or shared between two or more persons in union" (Abb. Law Dict.). "Joint trespassers" is defined as, "Persons who unite in the commission of a trespass." Id. Tested by the above definitions, there was no relationship between the defendants in respect to the production or the injuries sustained by the plaintiff justifying their joinder. They jointly perpetrated no act of negligence. They jointly omitted no duty of diligence resting jointly upon them. Each one omitted an act of diligence resting upon it, and it alone. The city omitted to discharge its

duty to keep its streets free from dangerous materials or obstructions; the electric light company omitted to discharge its duty to keep its dangerous conducting wires out of the way of passers-by; but the neglect of these duties, or this duty, was several, not joint. It was several, not joint, because springing from different sources. In the case of the city, it grew out of the obligations assumed under the franchise to be a municipal corporation; in the case of the company, it grew out of the obligation resting upon all persons to so use their own property as not to injure others. The duty in question had not been imposed upon the parties jointly, either by statute or by common law. The agencies for its discharge were not under the joint control of the two parties. The city was not in partnership with the company in the business of lighting the streets, nor the company in partnership with the city in the business of municipal government. There was not, therefore, between them any community of mental design, any joinder of physical action, nor any concurring lapse of mutual obligation. Nor can the joinder be permitted upon the ground that the electric light company was the agent of the city, performing for it the work of lighting its streets. The rule is well established that the master cannot be joined with the servant, nor the principal with the agent, in suits for injuries growing out of the negligence of the servant or agent, unless the wrongful act or omission was by the command of the master or principal, or was thereafter ratified by him. The case of Parsons *v.* Winchell, 5 Cush. 592, is full to this point, and, indeed, I do not know of an opposing decision. Upon the general question of the joinder of defendants in actions of tort the authorities are uniform to the effect that, in order to justify their union, there must be some community among them in the wrongdoing for which they are sued; the injury must be in a proper sense their joint work. Pom. Rem. & Rem. Rights, § 308; Bliss, Code Pl. § 83. The case of Trowbridge *v.* Forepaugh, 14 Minn. 133 (Gil. 100) is directly in point. In that case an abutting lot owner in a city dug and

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left open a dangerous hole in the street, into which a pedestrian fell. Suit for the resulting injury was brought against the lot owner and the city jointly,—against the former in respect of his negligent act, and against the latter in respect of its obligation to care for its streets. The court held that a joint action could not be maintained, because, as remarked, "the liability of the city depends on a state of facts not affecting its co-defendant, and the converse is equally true. Neither is, in fact or in law, chargeable with or liable for the matter set up as a cause of action against the other. They did not jointly conduce to the injury." The most forcible reason for the rule of joinder stated in the majority opinion is that, on account of the lapse of time between the breaking down of the wire and the injury to plaintiff, each of the defendants became chargeable with knowledge of the other's failure to repair the break or otherwise remove the danger, and thereby so concurred in, or, as it were, so adopted, the other's negligence, as to assume with it a joint liability. I take it, however, that unless there was a joinder of mutual obligation in the first instance none could thereafter arise out of mere knowledge upon the part of each defendant of the other's delinquency. Knowledge by a person that a duty resting separately upon another has not been performed by him cannot make the first-mentioned person liable with the other because the same duty likewise separately rests upon him. Joint liability in such cases must rest upon mutual obligation, and not upon knowledge by each of the other's dereliction of duty.

NOTE

Actions for Personal Injuries—Joinder of City and Other Tort Feasor.—A claim for injuries caused by accumulations of ice and snow, and in consequence of a cellar being open, cannot constitute a joint action against the property owner and the city. Kelly *v.* Newman, 6, How. Pr. (N. Y.) 156.

Where plaintiff, injured by an excavation in a lot, has an action against owner and municipality, he cannot join the two actions. Trowbridge *v.* Forepaugh, 14 Minn. 133.

JONES

v.

CITY OF GREENSBORO.

(*Supreme Court of North Carolina, March 28, 1899.*)

Personal Injuries—Decayed Tree near Sidewalk—Liability of City.* —Plaintiff while on a sidewalk of the city was struck and injured by the limb of a tree which fell from 15 to 25 feet, out of the top of the tree. *Held* that the city was not liable, it not appearing that the city, prior to the accident, had actual or implied notice of the decayed and dangerous condition of the limb.

Notice of Defect.—In such cases, knowledge of the defect on the part of the city will be inferred from the notoriety of the defect, open to reasonable observation; but if the defect be concealed or obscured in any way, so as to escape attentive observation on the part of the city, notice will not be attributed to it.

Burden of Proof.—In such cases, the burden of showing a defect and notice thereof to the city rests upon plaintiff.

APPEAL from Guilford county superior court. *Reversed.*

A. M. Scales, for appellant.

J. A. Barringer, for appellee.

FAIRCLOTH, C. J. The defendant is a duly-organized municipal corporation, and derives its powers and duties from its charter and the general statutes. Code, c. 62. By Code, § 3803, it is required to keep the streets and the bridges in the town in proper repair, in the manner and to the extent it may deem best; by section 3802, as well as by the common law, it may abate or prevent nuisances of any kind; and by section 60 of its charter the board of aldermen shall macadamize and pave the streets and sidewalks, and protect the shade trees of the city; and an ordinance provides that the trees shall be

*See notes at end of case.

trimmed only with the permission of, and under the direction of, the street committee. The plaintiff was walking on one of the sidewalks, when a limb fell from a tree standing on the edge of the sidewalk and injured him. The limb fell from 15 to 25 feet, out of the top of the tree. It is not alleged that the limb was dead, but it seems to have been treated as a dead limb during the trial. There was no evidence to show whether the limb was decayed, or whether it fell of its own weight, or fell in a storm. There was no evidence that any citizen, or any one else, had ever noticed the limb before it fell. One of the plaintiff's witnesses testified that he never saw the dead limbs in this tree prior to the time plaintiff was injured, although he had frequently passed it.

The general duties, powers, and liabilities of municipal corporations, as to keeping their streets and sidewalks in good repair, have been recently fully stated by this court in Bunch *v.* Town of Edenton, 90 N. C. 431, in Russell *v.* Town of Monroe, 116 N. C. 720, 21 S. E. 550, and in Dillon *v.* City of Raleigh (at this term), 32 S. E. 548; and it seems unnecessary to repeat them again so soon. Quite a diversity of opinion on these questions has been written by different courts. They agree that the corporation is not an insurer against all defects; that the corporation, however, will be held to a strict performance of its duties, within limits that are reasonable and just. The health, safety, comfort, and convenience of the public require this much, and the corporation is vested with the power and means necessary to perform its duties. The liability grows out of the power conferred on the city over its streets, including sidewalks, and its duty to keep them in reasonable repair, having the power to raise means for that purpose. Each case must depend upon its exact facts, and upon the circumstances of the particular case, in view of the statutory provisions of the state. Upon notice of defects and dangers in the streets, the city must remove them in a reasonable time, and failure to do so is negligence, and such negligence is the basis of an action.

by any one injured by reason thereof. The corporation, however, is not liable without notice of the defect which caused the injury. This notice may be actual or implied. Implied notice may be from facts from which it may be reasonably inferred, or from proof of circumstances from which it appears that the defect ought to have been known and remedied. Not only patent defects must be remedied but reasonable care must be exercised to discover defects; for it has been well said that "negligent ignorance is not less a breach of duty than willful neglect." So, whether constructive notice will be attributed to the city must depend upon the circumstances of each case. Nothing more than reasonable care to discover the defects will be required of the corporation. Notice will be inferred from the notoriety of the defect, open to reasonable observation; but, if it be concealed or obscured in any way, so as to escape attentive observation on the part of the defendant, notice will not be attributed to it. The burden of showing a defect and notice rests upon the plaintiff.

Personal Injuries—Decayed Tree near Sidewalk—Liability of City.

Notice of Defect.

Burden of Proof.

The defendant asked for this instruction to the jury: "If the jury shall find that the defendant had no notice, actual or implied, of the alleged defect, they should answer the first issue 'No.' " This should have been given, but was refused. We have read the whole charge in the record to see if this instruction was substantially given, and we think it was not; and it is not improbable that the jury were misled, and they probably considered that the prayer was improper, as it was directly refused. If we assume that the limb was a defect, there is no evidence in the case that it was decayed materially, or how long it had existed. No witness saw it before the accident, and there was no evidence that any one had seen it, or that any city officer knew of it, or could by reasonable diligence have seen it, before the accident. Stanton *v.* Salem, 145 Mass. 476, 14 N. E. 519. "A city is not charged with notice of a defect in a sidewalk which is not apparent to the ordinary observer, and whose existence is

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not known to the inhabitants of the city generally," and especially those in the immediate vicinity. Cook *v.* City of Anamosa, 66 Iowa, 427, 23 N. W. 907. "It is certainly true, as a general proposition, that before the corporate authorities can be held liable in this class of cases, it must be shown that they knew of the existence of the cause of injury, or had been notified of it, or such a state of circumstances must be shown that notice would be implied." Mayor *v.* Sheffield, 4 Wall. 195, 196. "Where a decayed tree, being struck by a heavy truck, fell upon and injured the plaintiff, it was held that if the tree was dangerous, but appeared safe, to outward observation, the defendant was not liable, and that the defendant was not bound to examine a hole which had existed on one side of the tree, although by so doing it would have discovered the decay." Gubasko *v.* Mayor, etc. (Com. Pl.) 1 N. Y. Supp. 215.

We think the plaintiff failed to meet the burden of proving his case, and a new trial is necessary, for the error already pointed out. New trial.

NOTE.

Falling Trees—Liability of City.—Where a tree which stood in a public street of a city, falls and injures a passer-by, and it is shown that the city authorities knew or might have known, by the exercise of proper care, of its dangerous condition, the city is liable in damages for such injury. Chase *v.* City of Lowell, (Mass.) 31 Am. & Eng. Corp. Cas. 78.

In Jones *v.* New Haven, 34 Conn. 1, it appeared that the charter of the city of New Haven gave the city power to make by-laws for the regulation and protection of trees in the public squares and streets. A dead limb which the city had negligently allowed to remain upon a tree in a public square fell and injured the plaintiff who was passing under. *Held*, that the city was liable in damages. And in Vosper *v.* New York, 49 N. Y. Superior Ct. 296, it was held that in an action against the city to recover for injuries sustained by the falling of a tree which was rotten at the roots, it need not appear that the tree showed exterior signs of decay. It is a question for the jury whether the city should have anticipated the danger.

So where a city is sued to recover damages for injuries sustained

from the fall of an old decayed tree in a public street, and it appears that the fall was immediately caused by a team striking it, the question of the city's negligence is for the jury, and a dismissal of the complaint on the ground that negligence did not appear has been held erroneous. Gubasko *v.* New York, 12 Daly, (N. Y.), 183. In a city where for a long time the municipality has, by its charter, had authority to plant, rear, trim, and preserve ornamental shade trees in the streets, proof that a defendant owns and occupies the lot in front of which such a tree stands on the street is not sufficient evidence that he planted or maintained the tree for his own uses, so as to charge him with the duty of trimming the same, and with responsibility for injury received by the plaintiff, upon whom a neglected and rotten limb had fallen. Weller *v.* McCormick, 47 N. J. L. 397, 11 Am. & Eng. Corp. Cas. 537.

CITY OF HENDERSON

v.

WHITE.

(*Court of Appeals of Kentucky, Feb. 21, 1899.*)

Failure to Repair Sidewalk—Personal Injuries—Damages.—Where a girl of 16 years of age has an arm seriously and permanently injured through the negligence of a city in permitting a sidewalk to get out of repair, a verdict for $500 is not excessive.

Same—Same—Liability of City.*—Where personal injuries result from the failure of the city to repair a dangerous place in a sidewalk, after it was chargeable with notice of its condition, and there is no evidence of contributory negligence, the city is liable.

Instructions.—Where there is no evidence of contributory negligence, it is proper to refuse to instruct on the subject, at defendant's instance.

Authorizing Use of Street—Estoppel.—Where a city has the weeds cut off a street, and the holes in it filled, it invites the public to use it, and is estopped to contend that it is not necessary for a street, or that it has not improved it.

APPEAL by defendant from Henderson county circuit court. *Affirmed.*

*See City of Circleville *v.* Sohn (Ohio), *ante* 50, and *note*, 58.

City of Henderson *v.* White

Clay & Clay, for appellant.
Montgomery Merritt and *Dudley & Pitts*, for appellee.

PAYNTER, J. While Mary White, a girl of 16 years of age, was walking, after night, along the sidewalk on Jefferson street, in the city of Henderson, she fell, and seriously and permanently injured one of her arms; and it was averred that it was the result of the gross negligence of the city in permitting the sidewalk to get out of repair. The verdict was for $500, and we are of the opinion that it was not excessive, considering the character of the injury which she received.

Failure to Repair Sidewalk—Personal Injuries—Damages.

The court properly instructed the jury. Under instruction No. 1, the jury could not have found against the city, except it believed from the evidence that the sidewalk was so out of repair as to be dangerous and unsafe for those passing on the same, and that the city had notice of its condition, or might have known it by the use of ordinary diligence, and that the plaintiff fell and injured herself by reason of that condition. If the answer can be construed as containing a plea of contributory negligence, there was no proof to sustain it, and the court properly refused an instruction upon that subject. Besides, instruction No. 1 required the jury to believe from the evidence that the injury resulted from the negligence of the city, and without the carelessness of the plaintiff.

Same—Same—Liability of City.

Instructions.

The testimony offered by the plaintiff tends to show that Jefferson street, in the vicinity of the accident, had several houses on it, and that the city had the weeds mowed off of the street, and had it repaired by having holes in it filled. The testimony was not impeached by the testimony of the city clerk to the effect that he had made an examination of the records, and found no order, resolution, or measure providing for the improvement of Jefferson street where the accident occurred. Counsel insists that there ought not to be a recovery in this case, be-

Authorizing Use of Street—Estoppel.

cause Jefferson street had never been improved by the city. This matter seems to have been abandoned on the trial, as the city failed to ask an instruction upon that question. As the city had the weeds cut off of the street, and the holes in it filled, it invited the public to use it, and cannot now be heard to say that it was not necessary for a street, or that it had not improved it. The judgment is affirmed.

FROST

v.

CITY OF CHICAGO.

(*Supreme Court of Illinois, Feb. 17, 1899.*)

Fruit Offered for Sale—Unreasonable Ordinance.—An ordinance making it unlawful to cover anything containing fruit offered for sale with any colored netting, or other material, having a tendency to conceal the true color or quality of the fruit is void, being unreasonable and oppressive.

ERROR by defendant to Cook county criminal court. *Reversed.*

A. E. Gammage (*Stedman & Soelke*, of counsel), for plaintiff in error.

Howard S. Taylor, Pros. Atty., and *George McA. Miller*, Asst. Pros. Atty., for defendant in error.

CARTER, C. J. Plaintiff in error was found guilty in the court below of violating an ordinance of the city of Chicago, and fined $15 and costs. The ordinance provided: "Sec. 1000. Colored Netting for Covering. It shall be and is hereby made unlawful to cover any box, basket, or any other package or parcel of fruit, berries or vegetables of any kind, with any colored netting, or any other material which has a tendency to conceal the true color or quality of any such goods which may be sold, offered for sale or had in posses-

sion for the purpose of being sold or offered for sale. Any person who shall violate the provisions of this section shall, upon conviction, be fined not less than $10 or more than $25 for each offense." The testimony tended to show that the defendant below sold peaches in baskets covered with red tarlatan,—a perforated cloth,—and that these baskets of peaches had been shipped to him from the state of Michigan, put up in the same manner in which he sold them. There was some evidence to the effect that this colored netting tended to conceal the "true color or quality" of the fruit, and some to the contrary. It appears from the record that large quantities of fruit put up in this manner are shipped and sold; that a covering of some kind is necessary to prevent loss of the fruit by pilfering and other means, and to protect it from insects; that such fruit requires ventilation; and that experience has demonstrated that a covering of netting is better than one of wood, paper, or other material, because it allows free access of air, does not bruise the fruit, and affords better means of inspection. The case seems to have turned below upon the color of the netting used, although there was testimony to prove that white, green, or blue netting (sometimes, but less frequently, used) would also conceal to some extent the true color or quality of the fruit. The case assumed some importance, as it appeared from the evidence that red tarlatan manufactured for the purpose has come into general use by packers and shippers of and dealers in fruit, and counsel say that many other cases are pending, to be finally determined by the decision of the case at bar.

Some minor questions have been raised, having reference to the admission or exclusion of evidence, and also to the point that as the evidence showed that plaintiff in error did not himself cover or cause to be covered with the colored netting the baskets of peaches which he had for sale, but merely offered them for sale as he had received them, he did not come within the ordinance. These minor questions may well be waived, and the case considered on more meritorious

grounds, involving the validity of the ordinance. Nor have we thought it necessary to consider the point made by the plaintiff in error, that the ordinance is not a mere local inspection law, but is an attempt to regulate interstate commerce, and to restrict the sale of goods in the original packages in which they were shipped from other states, and is therefore void, but are of opinion that the objection that it is void for unreasonableness was well made, and should have been sustained. We have reached the conclusion that the ordinance is a vexatious and unreasonable interference with and restriction upon the rights of dealers in certain articles of trade and commerce. The only valid basis upon which such a regulation can rest is that its purpose is to prevent deception, and imposition upon buyers of such articles as are named in the ordinance. The evidence shows, as common observation would teach, that such packages must have some covering, and shows, also, that tarlatan has been found the best and most suitable covering for the preservation of fruit so packed and sold; and the validity of the ordinance is made to depend, and indeed its validity is defended only, upon the question of the color of the material. It is not pretended that there is anything in red tarlatan which is deleterious to health, or which imparts to the fruit any noxious material or quality, but only that it tends to impart to the fruit beneath a more wholesome tint or appearance than it would otherwise have. It is natural, and not unlawful, for the packer and dealer to put up and offer for sale his goods in an attractive form; and a regulation would not seem to be reasonable which would prevent the dealer in certain commodities from offering for sale his goods in packages tinted so as to correspond in some degree with the color of the goods themselves. No buyer who is ordinarily careful and intelligent is deceived by such devices of tradesmen. He may examine what he buys, and no law can protect him from the consequences arising only from his own folly. At most, the colored netting would tend to conceal the true color or quality of only the top layer of the fruit in the package,

leaving the same latitude for deception as in cases where no covering is used. It will be noticed that the provision in question of the ordinance does not make it unlawful to sell decayed or unwholesome fruit, or to practice deception on the public by methods employed in packing or displaying it. From whatever view the ordinance is regarded, it is difficult to see how it can be of any public benefit whatever; and while, ordinarily, that is a question for the municipal legislature, it may be considered by the courts in determining the question of reasonableness. It is not contended by counsel that the power to pass such an ordinance is in terms conferred on the city council by any act of legislature (City of Lake View *v.* Tate, 130 Ill. 247, 22 N. E. 791), but the power to enact it is referable to the general police power of the city; and it is conceded that the question of its reasonableness is open for decision, and is the subject of fair contention in the case. It was shown, and is a matter of common knowledge, that much fruit is shipped and sold wrapped up in tissue paper and in tinfoil, and in packages and baskets covered with wood, all of which material effectually conceals the "true color and quality" of the fruit, until removed. It would be as reasonable to prohibit the one as the other. Fruit dealers would be subjected to unjust and oppressive discrimination by the enforcement of such an ordinance. Being unreasonable and oppressive in character, the ordinance is void, and should have been so declared by the court below. The judgment is reversed. Judgment reversed.

TOWN OF WHITING

v.

DOOB.

(*Supreme Court of Indiana, Feb. 2, 1899.*)

Pleading—Where the complaint has been superseded by an amended complaint, a subsequent demurrer to the "complaint" refers to the amended complaint.

Town of Whiting *v.* Doob

Statute Prohibiting Riding on Sidewalks—Repeal by Implication.* —Under the laws of Indiana, when any act is made a public offense against the state, by any statute, and the punishment is prescribed therefor, such act cannot be made punishable by an ordinance of a municipal corporation; and the act making it unlawful to ride upon the sidewalk of any town is not repealed by implication by the act authorizing town trustees to prohibit riding upon town sidewalks.

Construction of Penal Statute—Violation of Ordinance—Complaint.—The statute making it a misdemeanor to ride or drive upon a brick, stone, plank or gravel sidewalk, does not apply to the act of riding or driving upon sidewalks constructed of other materials; and a city may make it an offense to ride bicycles on sidewalks constructed of other materials, but the complaint under such an ordinance must show that the sidewalk in question was of other materials than those specified in the statute.

APPEAL by plaintiff from Lake county circuit court. *Affirmed.*

John W. Wartman and *John G. Erdlitz*, for appellant.
F. N. Gavit, for appellee.

DOWLING, J. The appellee was charged with the violation of an ordinance of the town of Whiting, in riding a bicycle upon a sidewalk of that corporation. The action was commenced by filing a verified complaint before a justice of the peace of Lake county. On the day of the trial, and before any other proceedings were had, an amended complaint was filed. Appellee thereupon filed a demurrer, which referred to this pleading as the "complaint." The demurrer was sustained, and there was judgment for the appellee. An appeal to the Lake circuit court was taken by the town, and there, as is shown by the record, "the defendant renews his demurrer herein." The court sustained the demurrer, and, the appellant refusing to amend or plead further, judgment was rendered for appellee. The town of Whiting appealed to this court, and the error assigned is the ruling of the court on the demurrer. The objection is made by counsel

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Pleading.

*See notes at end of case.

for appellee that the demurrer was sustained, not to the complaint, but to the amended complaint, and, therefore, that no question is presented by the assignment of error. We think otherwise. The amended complaint superseded the complaint first filed, so that it ceased to be a part of the record. Kirkpatrick *v.* Holman, 25 Ind. 293. The pleading last filed by appellant became the complaint in the cause, and was the only pleading on file to which a demurrer could be addressed.

The ordinance under which this proceeding was taken reads thus: "Sec. 14. It shall be unlawful for any person to ride, propel, or use in any manner upon any sidewalk within the corporate limits of the town of Whiting, any bicycle, or safety-wheel, used for exercise, business or pleasure. * * *" Section 54 of this ordinance declares the penalty for a violation of its provisions. The validity of the ordinance is assailed on the ground that riding or driving upon the sidewalks of any town in this state is made a public offense against the state, for which punishment is prescribed, and that such offense cannot be made punishable by an ordinance of any corporated town or city. The sections of the statute to be considered are these: "It shall be unlawful for any person to ride or drive upon the brick, stone, plank, or gravel sidewalk of any town or village, or upon any similar sidewalk for the use of foot passengers by the side of any public highway in this state, unless in the necessary act of crossing the same." Acts 1867, p. 194 (Burns' Rev. St. 1894, § 4398; Rev. St. 1881, § 3361). "Whenever any act is made a public offense against the state, by any statute, and the punishment prescribed therefor, such act shall not be made punishable by any ordinance of any incorporated city or town; and any ordinance to such effect shall be null and void, and all prosecutions for any such public offense as may be within the jurisdiction of the authorities of such incorporated cities or towns, by and before such authorities, shall be had under the state law only." Acts 1881, p. 114

Statute Prohibiting Riding on Sidewalks—Repeal by Implication.

(Rev. St. 1881, § 1640; Burns' Rev. St. 1894, § 1709). Counsel for appellant contends that an act authorizing boards of town trustees to prohibit the incumbering of the sidewalks of such towns, and riding or driving thereon, and empowering such boards to carry out the provisions of the act or by-laws, ordinances, and regulations approved April 10, 1885, repeals by implication so much of the act of 1881, *supra*, as prohibits cities and towns from enforcing ordinances against acts which are punishable as offenses against the state. We cannot discover in the act of 1885 any indication that it was intended to repeal the earlier statute. The two acts are not repugnant. The boards of towns may, by ordinance, by-law, or other mode of regulation, prohibit riding or driving on the sidewalks; but by the terms of this very act they must do so by by-laws, ordinances, or regulations not repugnant to the laws of the state. The object of the statute of 1881 was to prevent a double prosecution for a single act, by withholding from cities and towns the power to impose fines or penalties in any case where the offense was punishable under the criminal laws of the state. There is no reason to suppose that the legislature by the act of 1885 intended to abolish this salutary restriction. But the statute making it a misdemeanor to ride or drive upon a brick, stone, plank, or gravel sidewalk being a penal one, it is to be strictly construed, and it could not be held to apply to the act of riding or driving upon sidewalks constructed of other materials than brick, stone, plank, or gravel. In an indictment under this law, it would be necessary to state particularly the kind of sidewalk—whether brick, stone, plank, or gravel—over which the person charged rode or drove. Riding or driving over sidewalks other than such as are composed of brick, stone, plank, or gravel not being made an offense against the state, and punishable as such, the authorities of cities and towns may lawfully prohibit riding or driving upon such sidewalks; and if, in an action under a general ordinance of a city or town, the complaint showed

Construction of Penal Statute—Violation of Ordinance—Complaint.

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that the sidewalk over which the defendant rode or drove was not of brick, stone, plank, or gravel, but was constructed of other material, such ordinance would be valid as to such other kinds of sidewalks, and a prosecution might be maintained under the same. In this case the town ordinance is general in its terms. The complaint fails to show that the sidewalk therein mentioned is not of brick, stone, plank, or gravel, and that it is composed of some other material. Under such a complaint, if upheld, the penalty might be recovered against appellee even if the sidewalk was of brick, stone, plank, or gravel. That a bicycle is a vehicle, and that riding a bicycle upon the brick, stone, plank, or gravel sidewalks of a town or city is a public offense against the state, punishable under the act of 1881, *supra*, is settled by the decisions of this court. City of Indianapolis *v.* Higgins, 141 Ind. 1, 40 N. E. 671; Bybee *v.* State, 94 Ind. 443.

As the complaint fails to show that the act charged against appellee was such as the town had authority to prohibit and punish, the demurrer to it was properly sustained. Judgment affirmed.

NOTES.

Ordinances—Statutes—Repeal.—A power vested by legislature in a city corporation, to make by-laws for its own goverment and the regulation of its own police, cannot be construed as imparting to it the power to repeal the [general] laws in force, or to supersede their operation by any of its ordinances. Such a power, if not expressly conferred, cannot arise by mere implication, unless the exercise of the power given be inconsistent with the previous law, and does necessarily operate as its repeal *pro tanto*. Nor can the presumption be indulged, that the legislature intended that an ordinance passed by the city should be superior to, or take the place of, the general law of the state upon the same subject. March *v.* Commonwealth, 12 B. Mon. (Ky.) 25; Rothschild *v.* Darien, 69 Ga. 503; Breninger *v.* Belvidere, 44 N. J. L. 350.

Validity of Municipal Ordinances Covered by State Legislation—In some states where there is a general law regulating any particular

Notes

matter, it is held that municipalities have the power to pass ordinances on the same subject, their authority not being ousted. The jurisdiction of the state and of the municipality is concurrent. Ambrose *v.* State, 6 Ind. 351; Waldo *v.* Wallace, 12 Ind. 582; Lawrenceburg *v.* West, 16 Ind. 337; Brownville *v.* Cook, 4 Neb. 101; State *v.* Ludwig, 21 Minn. 202; Brooklyn *v.* Toynbee, 31 Barb. 282; Shafer *v.* Mumma, 17 Ind. 331; March *v.* Commonwealth, 12 B. Monr. (Ky.) 25; Howe *v.* Plainfield, 38 N. J. 145; Hamiliton *v.* State, 3 Tex App. 643; Mobile *v.* Rouse, 8 Ala. 515; Greensboro *v.* Mullins, 13 Ala. 341; Moore *v.* State, 16 Ala. 411.

How far Invalid.—In other states it is held that where an offence against the ordinance would be in its nature indictable, no proceedings can be had except under the State law. But a municipality is at liberty to enforce its ordinance by any appropriate means short of indictment. State *v.* Conway, 29 Mo. 330; New Orleans *v.* Miller, 7 La. Ann. 651; Municipality *v.* Wilson, 5 La. Ann. 747; People *v.* Jackson, 8 Mich. 110; Wayne Co. *v.* Detroit, 17 Mich. 390; People *v.* Detroit, 18 Mich. 445; Savannah *v.* Hussey, 21 Ga. 80; Vason *v.* Augusta, 38 Ga. 542; Berch *v.* State, 53 Ga. 73; Trimble *v.* Bucyrus (Ohio), 21 Alb. L. J. 76; Raleigh *v.* Dougherty, 3 Humph. (Tenn.) 11; Rice *v.* State, 3 Kan. 141; State *v.* Coummey, 17 Minn. 72; Mount Pleasant *v.* Breeze, 11 Iowa, 399; Ridgeway *v.* West, 60 Ind. 371; Society *v.* Musgrove, 44 Miss. 820; Moore *v.* State 48 Miss. 147; State *v.* Tryon, 39 Conn. 183; McLaughlin *v.* Stevens, 2 Cranch, C. C. R. 148; United States *v.* Holly, 3 Cranch, C. C. R. 656; State *v.* Pollard, 6 R. I. 290; Barter *v.* Comm., 3 Penrose & Watts (Pa.), 253; State *v.* Clark, 1 Dutch (N. J.), 54; Howe *v.* Plainfield, 38 N. J. Law, 145; Petersburg *v.* Metzker, 21 Ill. 205; Zylstra *v.* Charleston, 1 Bay (So. Car.), 382; Commissioners *v.* Harris, 7 Jones (Law), 281; Borough of New York *v.* Forscht, 23 Pa. St. 391; New York *v.* Hyatt, 3 E. D. Smith (N. Y.), 156; Rogers *v.* Jones, Wend. 261, State *v.* Plunkett, 3 Harrison (N. J.), 5; Davis *v.* State, 4 Stew. & Port. (Ala.) 83; Jefferson City *v.* Courtmire, 9 Mo. 683; St. Louis *v.* Bentz, 11 Mo. 61; State *v.* Ledford, 3 Mo. 102; Brooklyn *v.* Toynbee, 31 Barb. 282; Davenport *v.* Bird, 34 Iowa, 524; St. Charles *v.* Meyer, 58 Mo. 86; St. Louis *v.* Cafferata, 24 Mo. 94; Independence *v.* Moore, 32 Mo. 92; Town of Washington *v.* Hammond, 76 N. C. 33; State *v.* Langston, 88 N. C. 692, 4 Am. & Eng. R. Cas. 257. See, particularly, Foster *v.* Brown, 55 Iowa, 686.

STATE

v.

CRUICKSHANK.

(*Supreme Court of Vermont, Jan. 26, 1899.*)

Ordinances—Judicial Notice.*—A complaint alleging the violation of city ordinances should set them out, as the court cannot take judicial notice of them.

Same—Pleading.—But such complaint properly concluded against the form of the statute, though, perhaps, it should also have concluded against the form of the ordinances.

EXCEPTIONS by respondent from city court of Barre. *Reversed.*

G. T. Swasey and *John W. Gordon*, for the State.

Richard A. Hoar, for respondent.

ROWELL, J. This complaint lacks substance. It alleges that the respondent did ride a bicycle along and upon the sidewalk on a certain street in the city of Barre, "in violation of sections twenty-five and thirty-six of chapter thirteen of the ordinances of said city," *contra formam statuti*. It should have set out the ordinances, as the court cannot take judicial notice of them. State *v.* Soragan, 40 Vt. 450. It properly concluded against the form of the statute. State *v.* Soragan, *supra*. Perhaps it should also have concluded against the form of the ordinances. Judgment reversed, demurrer sustained, complaint adjudged insufficient, and cause remanded.

Ordinances—Judicial Notice.

Same—Pleading.

NOTE.

Municipal Ordinances—Judicial Notice.—Courts cannot take judicial notice of municipal ordinances. Elizabethtown *v.* Lefler, 23 Ill. 90; Case *v.* Mobile, 30 Ala. 538; Harker *v.* Mayor, etc., of N. Y.,

17 Wend. (N. Y.) 199; Mooney *v.* Kennett, 19 Mo. 551; s. c. 61 Am. Dec. 576; New Orleans *v.* Boudro, 14 La. Ann. 301; People *v.* Mayor, etc., of N. Y., 7 How. Pr. (N. Y.) 81; People *v.* Buchanan, 1 Idaho 681; Wheeling *v.* Black, 25 W. Va. 266; Austin *v.* Waltin, 68 Tex. 507; Goodrich *v.* Brown, 30 Iowa 291; Garvin *v.* Wells, 8 Iowa 286; Cox *v.* St. Louis, 11 Mo. 431; Central Sav. Bank of Baltimore *v.* Baltimore (Md.), 20 Atl. Rep. 285. *Compare* Downing *v.* Miltonvale, 36 Kan. 740; State *v.* Soragan, 40 Vt. 450.

And they must be pleaded and proved like other facts. Austin *v.* Walton, 68 Tex. 507; Feltmaker's Co. *v.* Davis, 1 Bos. & Pul. 98; Coates *v.* Mayor, etc., of N. Y., 7 Cow. (N. Y.) 585; Case *v.* Mobile, 30 Ala. 538; Piper *v.* Chappell, 14 M. & W. 624; Huntington *v.* Pease, 56 Ind. 305.

WATT

v.

JONES.

(*Supreme Court of Kansas, Feb. 11, 1899.*)

Municipal Ordinances—Judicial Notice.*—In civil actions, courts will not take judicial notice of a city ordinance. It must be pleaded by quoting its language or stating the substance of its provision. A reference to the ordinance by title is not sufficient.

Title to Office—Elections—Fraud—Pleading.—A defendant in an action brought against him to determine the right to the office of councilman of a city of the second class, who answers, alleging fraud in the election, and prays for affirmative relief, must aver that he is qualified to hold the office.

(Syllabus by the Court.)

ERROR by defendant from Douglas county district court. *Affirmed.*

McHale & Learnard, for plaintiff in error.

Poehler & Mason, for defendant in error.

SMITH, J. The defendant in error, J. M. Jones, filed a petition in the district court of Douglas county, alleging, in substance, that on the 6th day of April, 1897, there was held in the city of Lawrence an election of city officers; that at the said election the plaintiff was

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*See State *v.* Cruickshank (Vt.), *ante*, and *note*.

a candidate for the office of councilman of the Fifth ward on the Populist or Citizens' ticket, and was a duly-qualified elector of said ward and city; that at said election the said J. M. G. Watt was likewise a candidate for the office of councilman of the Fifth ward, in opposition to the plaintiff; that the judges of the election determined that the plaintiff and the defendant, Watt, had each received 151 votes; thereupon they proceeded to determine the election of a candidate by lot; that the lot fell to the plaintiff, Jones, and he was thereupon, by the said judges of election, declared to be elected to the office of councilman from the Fifth ward; that the returns were sent to the city clerk, as provided by law; that the mayor and councilman met as a canvassing board, and canvassed the returns of the election, and adjourned over until the ——— day of April, 1897, and at said adjourned meeting they examined the returns of the officers of the election of the Fifth ward in the manner provided by law, and thereupon determined and resolved that the plaintiff, Jones, was the duly-elected councilman of said Fifth ward, and ordered a certificate of election to be issued to him; that, notwithstanding the fact that said board of canvassers declared the plaintiff elected, and ordered a certificate issued, the said Watt wrongfully and improperly usurped the said office, and wrongfully holds and exercises the office of city councilman, to which the plaintiff was legally elected. The prayer is for a judgment of ouster, asking that the defendant, Watt, be excluded from the said office, and that the plaintiff, Jones, be awarded the same, and for costs. The defendant, Watt, answered, in substance, as follows: (1) A general denial of all the allegations of the petition not admitted in the answer. (2) Admitting that there was an election on April 6, 1897, in the city of Lawrence, and that the plaintiff and defendant were each candidates for the office of councilman for the Fifth ward; that the defendant was the regularly nominated candidate for said office on the Republican ticket, and that the plaintiff was the regularly nominated candidate

on the Citizens' ticket; that the election board of said Fifth ward made return to the city council that said plaintiff and defendant each had received 151 votes, and that said judges of election had determined the result thereby by lot, as alleged in the petition; and admitting, further, that on the 12th day of April, 1897, the city council, sitting as a canvassing board, canvassed the returns of said election of said Fifth ward, and, upon such canvassing of said returns, declared the plaintiff, Jones, to be elected. (3) The defendant, Watt, answered, further, that at said election H. J. Snyder and four others named constituted an election board; that after the ballots had been cast by the electors of said ward, and the polls closed, and while said election board was counting the ballots, J. M. Cooper (while acting as clerk of said election board), manipulated the tally sheets in such a way, by entering therein more tallies for the plaintiff, Jones, than he had received votes, so as to cause said tally sheets to show that the plaintiff and defendant had each received the same number of votes; thereon said election board proceeded to determine said election by lot; that said board wrote upon slips of paper the names of said plaintiff and defendant respectively; that said slips of paper, with said names written thereon, were placed in a hat by said judges of election; that it was agreed by said board that whichever candidate's name was first drawn out should be returned as the successful candidate; that the name of the defendant, Watt, was first drawn out, and said defendant was then entitled to be returned as the successful candidate; that said election board, disregarding the rights of the defendant in that respect, replaced said slips of paper in said hat the second time, and at such second lot drew out first the slip of paper containing the name of the plaintiff Jones, and thereon said election board returned the name of said Jones as the successful candidate; that, upon such fraudulent and illegal returns, the city council, while sitting as a canvassing board, declared the plaintiff, Jones, elected, and ordered a certificate of election to issue to him, as aforesaid. (4) Defendant,

Watt, further answering, alleged: That within 10 days after said election was held, and on April 12, 1897, said defendant, Watt, pursuant to the provisions of section 18 of Ordinance No. 7 of the Revised Ordinances of the City of Lawrence, entitled "An ordinance relating to elections," stated to said city council, in writing, his grounds of contest of said election, and caused due legal and personal notice to be served upon said plaintiff, Jones. That said city council thereupon fixed the time and place to hear and determine said contest. That thereafter, on the 19th day of April, 1897, in the council chamber of the city of Lawrence, at the time and place fixed for the hearing, said city council, acting as a contest board, proceeded to hear and determine said contest. That, at said hearing, both parties appeared by attorney. That said city council, acting as a contest board as aforesaid, having heard the allegations and evidence of the parties and argument of counsel, and having recounted all the ballots cast in said Fifth ward at said election, and being fully advised in the premises, did find and determine that said plaintiff, Jones, had received at said election 149 votes, and said defendant, Watt, had received 152 votes; whereupon the city council adopted the following resolution, to wit: "Whereas, the city council of the city of Lawrence, sitting as a contest board, having recounted the ballots cast at the said election held April 6, 1897, for the election of councilman of the Fifth ward in said city; and whereas, on such recount J. M. G. Watt received, for councilman of the Fifth ward in said city, 152 votes, and J. M. Jones 149 votes: Therefore, be it resolved, that J. M. G. Watt be, and is hereby, declared as councilman from the Fifth ward in the city of Lawrence; and be it further resolved that the mayor and clerk be authorized and directed to issue to him a certificate of election as such councilman." That thereupon said mayor and clerk made and issued to the defendant, Watt, a certificate of election. That said defendant duly qualified as councilman from said Fifth ward, and entered upon the discharge of the duties of his office, and has ever since held,

and still holds, said office, and enjoys all and singular the honors and emoluments thereof. That, by reason thereof, said contest is now fully settled and determined, and no cause of action accrues to said plaintiff to relitigate said contest in an independent action. (5) The defendant below further answered that at said election he received a majority of all the votes cast in said Fifth ward; that the total number of ballots cast was 333; that the defendant, Watt, received 157, and the plaintiff, Jones, 149; that of said number of votes cast for said plaintiff, Jones, seven illegal ballots were cast and counted for him; that seven ballots contained identifying and distinguishing and other improper markings; and that the same could not be lawfully counted for said Jones. (6) That five persons who had no legal capacity to vote appeared at said voting place in the Fifth ward, and voted for said plaintiff, Jones. (7) That a recount of the ballots cast at said election in said Fifth ward would show that defendant, Watts, received a majority of all the votes cast for councilman in said Fifth ward, and was legally entitled to hold said office. To this answer the plaintiff below, Jones, filed a demurrer, stating as reasons that said answer did not state facts sufficient to constitute a cause of action or defense to or against the said petition. This demurrer to the answer was sustained by the district court, and the plaintiff in error, Watt, electing to stand thereon, judgment of ouster was rendered against him.

We are not informed as to the precise point upon which the demurrer to the answer was sustained. The defendant in error made no appearance in this court, and no briefs have been filed in his behalf. The allegations contained in paragraph 4 of the answer relate to contest proceedings commenced by the defendant below before the city council. That tribunal seems to have been authorized by ordinance to hear and decide contests between persons claiming to have been elected to any city office. In the answer it is referred to by title as "An ordi-

Municipal Ordinances—Judicial Notice.

nance relating to elections." Its contents are not pleaded. Our knowledge of it is derived from the brief of the plaintiff in error. All the proceedings of the council as a contest board, and its authority to so act, are based upon its provisions. The resolution ordering a certificate of election to issue to the defendant is but declaratory of the findings of the council so assembled by virtue of said ordinance. Unless the court below could have taken judicial notice of this ordinance, it could not consider the proceedings had before said contest board, nor their result. This was a civil action between individuals. We think the rule is well established that in such cases an ordinance (which is a mere by-law of a municipal corporation) must be pleaded either by quoting its language or stating the substance of its provisions. A reference to the title is not sufficient. Ordinances stand on the same footing as private and special statutes, the laws of other states and of foreign countries, and must be averred and proved like other facts. 17 Am. & Eng. Enc. Law, 262; City of Austin *v.* Walton, 68 Tex. 507, 5 S. W. 70. Upon this question this court has heretofore gone no further than to hold that in misdemeanor cases, where an appeal is taken from the police court of a city to the district court, the latter will take judicial notice of the ordinance under which the defendant is being prosecuted. In such cases the district court is *pro hac* vice the police court. City of Solomon *v.* Hughes, 24 Kan. 211; Downing *v.* City of Miltonvale, 36 Kan. 740, 14 Pac. 281. It follows, then, that paragraph or count 4 of the answer stated no defense to the allegations of the petition, nor did it set up any grounds of counterclaim which could be considered by the court.

The fifth and sixth counts of the answer state sufficient facts to constitute a defense to the plaintiff's claim. They aver that the total number of ballots cast was 333; that the defendant received 157, and the plaintiff, Jones, 149; that there were 7 illegal ballots cast and counted for Jones; that these ballots contained identifying and distinguishing marks; that five persons, who

Title to Office—Elections—Fraud—Pleading.

had no legal capacity to vote, appeared at the Fifth ward polls, and voted for the plaintiff, Jones. The allegations of said counts or paragraphs, if proven, would have entitled the defendant, Watt, to the office. Dorey *v.* Lynn, 31 Kan. 758, 3 Pac. 557. The facts set up in these paragraphs were sufficiently and definitely pleaded to stand good as against a demurrer. The answer, however, nowhere alleges that Watt, the defendant below, was a qualified elector of the city of Lawrence. This qualification is a prerequisite to the holding of any city office under the law regulating cities of the second class. 1 Gen. St. 1897, c. 37, § 35, reads: "All officers elected or appointed shall be qualified electors of said city." The constitution fixes the qualifications of electors. Const. art. 5, § 1. Again, 1 Gen. St. 1897, c. 37, § 21, reads: "No persons shall be eligible to the office of councilman who is not at the time of his election an actual resident of the ward for which he is elected." There is no averment in the answer which brings the defendant in error within the requirements of either section of the statute quoted. It might be asserted that, a certificate of election having been issued by the council to the defendant in error, Watt, the same presupposes that all previous qualifications for the office existed. This certificate of election, however, as before stated, was ordered issued by a tribunal acting as a contest board, assembled under a city ordinance not pleaded, the provisions of which we cannot judicially know. The answer of Watt is in the nature of a cross petition, in which he asks affirmative relief against Jones, and prays that he be adjudged to have been elected. His demand is based upon the fact that he received 157 votes, and Jones 149; that illegal ballots were cast for Jones, which had distinguishing marks upon them, and ought not to have been counted for Jones; and, further, that five persons who had no legal capacity so to do voted for Jones. This demand of the defendant below for affirmative relief should have contained an allegation that he was qualified to hold the office. People *v.* Wallace, 91 Cal. 535,

27 Pac. 767; State *v.* Long, 91 Ind. 351; Reynolds *v.* State, 61 Ind. 392. The answer having failed to state this material allegation, the demurrer thereto was properly sustained. The judgment of the court below will be affirmed. All the justices concurring.

CITY OF IOLA

v.

SUGG.

(*Court of Appeals of Kansas, March 15, 1899.*)

Dog Tax—Validity of Ordinance.*—A city of the third class may, within the limits of the city, require the owner, keeper, or harborer of any dog to register the name, together with the description, of the dog, with the city clerk, and to pay a reasonable tax or license for each dog, although the dog so taxed or licensed may never have been permitted to run at large.

(Syllabus by the Court.)

APPEAL by defendant from Allen county district court. *Affirmed.*

Oscar Foust & Son, for appellant.

J. F. Thompson, City Atty., for appellee.

SCHCONOVER, J. The appellant was charged with violating the city ordinance of the city of Iola, passed while said city was a city of the third class. The case was submitted upon an agreed statement of facts in the court below, the defendant found guilty, and adjudged to pay a fine of one dollar. He now appeals to this court.

1 Gen. St. 1897, p. 460, § 64, provides: "* * * The council may also regulate and provide for taxing the owners and harborers of dogs, and authorize the killing of dogs found at large contrary to any ordinance regulating the same." The particular section of the ordinance under which

*See note at end of case.

the defendant was arrested is as follows: "That no person shall be allowed to keep within the limits of said city any dogs or hybrid over three months old, unless said person shall comply with the following regulations, to wit: The owner, keeper or harborer of any dog or hybrid shall cause his or her name, with the name and description of such animal, to be registered with the city clerk in the dog register, and shall pay to the said city, on or before the 30th day of April, in such year, an annual tax of one dollar for each male dog and two dollars for each female dog or hybrid, and shall keep upon the neck of such animal so registered a metallic or leather collar, to which shall be kept attached a metallic check, to be furnished by the city, with the registry number, the letters 'D. T. P.,' and the word 'Iola' stamped thereon: provided, that the license may be issued for any fraction of a year to expire on May 1st, following, and the tax therefor shall be apportioned accordingly. Upon payment of the tax hereinbefore provided for, and the clerk's fee for registering and license, the city clerk shall register the dog or hybrid for which the same is paid and shall issue to the person paying the same a license for such animal; and any person who shall keep, own and harbor any dog or hybrid in the city of Iola in violation of the provisions of this section shall be deemed guilty of a misdemeanor. * * *

This complaint charges "that defendant did then and there unlawfully keep, own, and harbor a certain dog (a more particular description the affiant is unable to give), without having the name and description of such animal registered with the city clerk in the dog register, and without having paid the annual tax thereon, contrary to the provisions of the ordinance of said city made and provided."

The case was submitted to the trial court upon the following agreed statement of facts:

"First. That on May 11, 1898, a complaint was filed in the police court of the city of Iola (a city of the second class), Allen county, Kansas, charging that the defendant,

on the 10th day of May, 1898, and before that time, and after the 30th day of April, 1898, did keep, own, and harbor a certain dog, etc., contrary to the provisions of the ordinance of said city made and provided. Said complaint filed herein and made a part hereof.

"Second. That on the same day, May 11, 1898, a warrant was issued on said complaint out of said court; that on May 13, 1898, a trial was had in said court, defendant found guilty, and sentenced to pay a fine of two dollars and costs of action, and defendant appeals to this court.

"Third. That the ordinance under which said complaint was filed and warrant issued, trial had, and defendant sentenced is Ordinance No. 314, page 189, etc., passed by the council of said city, while it was a city of the third class, which said ordinance is referred to and made a part of this agreed statement of facts; and the clerk made the publication of notice to register, as required by section No. 3 of said ordinance.

"Fourth. It is agreed to be the fact that the defendant did own a dog over three months old, as described in complaint, on April 30, 1898, and since then, and now, owns said dog; that he has continously kept, since April 30, 1898, before then, and now keeps said dog on his premises, in the city of Iola, aforesaid; keeps, and always has kept, said dog tied securely; and does not nor has he ever permitted him to run at large.

"Fifth. It is further agreed that the defendant, prior to the filing of complaint herein, during the year 1898, did not register said dog in the office of the city clerk of the city of Iola, Allen county, Kan., nor did he pay any tax on said dog, prior to filing of complaint herein, for year 1898.

"On the part of plaintiff, it is claimed that, under the aforesaid facts, the defendant is guilty of a violation of said ordinance, and that the said ordinance is a constitutional and valid enactment.

"On the part of defendant, it is claimed (1) that said ordinance in invalid, and is in violation of the constitution

of the state of Kansas and the constitution of the United States; and (2) that, even if the same is a valid ordinance, that, under the facts of the case, this defendant is not guilty of violating same."

It is admitted by the appellant that the city may, in a legal and proper manner, regulate the running at large of dogs. It is also admitted that the city may tax dogs, if taxed as other personal property.

It is admitted that the appellant was the owner of a dog that was never permitted to run at large, and the question presented is, can a person be prosecuted for the violation of the ordinance who owns a dog that is kept confined on his premises? In the ordinance complained of two distinct offenses are created,—one for keeping, owning, and harboring a dog without complying with the provisions of the ordinance in regard to registration; the other for permitting dogs to run at large without complying with the ordinance in such respects. The question in this case has not been directly passed upon by the supreme court, but, in our opinion, the law, as stated by JUSTICE VALENTINE in the case of State *v.* City of Topeka, 36 Kan. 76, 12 Pac. 310, may be extended to cover the objection raised by the appellant in this case.

It is further contended that the ordinance is invalid because it contained more than one subject, and same were not clearly expressed in its title. The ordinance was passed by the city council of the city of Iola while it was a city of the third class. The statute governing cities of the third class at the time the ordinance was passed, provided that "the style of all ordinances shall be: 'Be it ordained by the mayor and councilmen of the city of——.' " Gen. St. 1889, par. 939. The ordinance in controversy complies with the provision of the statute. In the case of City of Cherokee *v.* Fox, 34 Kan. 16, 7 Pac. 625, our supreme court says: "Nor is such ordinance void for the reason that it has no title, when in fact its title corresponds precisely with the requirements of the statute." See case of

City of Humboldt *v.* McCoy, 23 Kan. 249. The judgment of the district court is affirmed.

NOTE.

Keeping Dogs—Municipal Ordinances.—It is within the police power of a municipality to regulate the keeping of dogs within its limits by ordinances, and to enforce such ordinances by fines and penalties; Com. *v.* Chase, 6 Cush. (Mass.) 248; Morey *v.* Brown, 42 N. H. 373; Com. *v.* Steffee, 7 Bush (Ky.) 161; Culver *v.* Streator (Ill.), 27 Am. & Eng. Corp. Cas. 602; Mitchell *v.* Williams, 27 Ind. 62; Carter *v.* Dow, 16 Wis. 298; Tenny *v.* Lenz, 16 Wis. 566. *Ex parte* Cooper, 3 Tex. App. 489; Faribault *v.* Wilson, 34 Minn. 254. *Compare* Mayor, etc., of Washington *v.* Meigs, 1 McArthur (D. C.) 53.

But it has been *held* in several cases that, as the law recognizes property in dogs, a city ordinance requiring the owner of dogs to obtain a license to keep the same, and subjecting him to arrest, fine and imprisonment for not procuring such license, is invalid. Washington *v.* Meigs, 1 McArthur (U. S.) 53; Harrington *v.* Miles, 11 Kan. 480; State *v.* Lymus, 26 Ohio St. 400.

Brown

v.

Town of Social Circle.

(*Supreme Court of Georgia, Nov. 17, 1898.*)

Intoxicating Liquors*—Keeping for Unlawful Sale—Validity of Ordinance Prohibiting.—The town of Social Circle has authority, under the general welfare clause in its charter, to pass and enforce an ordinance prohibiting the keeping for unlawful sale, within the limits of the town, any alcoholic, malt, or other intoxicating liquors. Paulk *v.* Mayor, etc., (Ga.) 31 S. E. 200, and cases cited.

Case at Bar.—The ground of the *certiorari* which complained of the refusal to grant a continuance was without merit, the evidence was sufficient to authorize the judgment, and there was no error in overruling the *certiorari*.

(Syllabus by the Court.)

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*See notes at end of case.

Notes

ERROR by defendant from Walton county superior court. *Affirmed.*

A. C. Stone, for plaintiff in error.

W. S. Upshaw, for defendant in error.

PER CURIAM. Judgment affirmed. All the justices concurring, except SIMMONS, C. J., absent, and LUMPKIN, P. J., absent on account of sickness.

NOTES.

Prohibiting Sale of Intoxicating Liquor—Validity of Municipal Ordinances.—*Alabama.*—Russellville Town Charter (Acts Ala., 1890-91, p. 796) gives the mayor and aldermen power to pass ordinances suppressing all offenses against "public morality and decency," in which is classed the unlawful sale of intoxicating liquors. *Held*, that such charter provision was a valid delegation of authority to enact an ordinance prohibiting the sale of intoxicating liquors in the town, such matter being within the police regulation. *Ex parte* Town of Russellville, (Ala., April 27, 1892) 11 So. Rep. 18.

Kentucky.—Where the charter of a town gives it authority to make ordinances for the preservation of good order, decency, and decorum, and where the sales of intoxicating liquors are unlawful in the county in which such town is situated, the town has authority to enact an ordinance forbidding the sale of intoxicating liquors therein, and prescribing a penalty for its violation. Fortner *v.* Duncan *et al.* (Ky.), 37 Am. & Eng. Corp. Cas., 540.

Utah.—A municipal corporation has no implied power to prohibit the manufacture and sale of intoxicating liquors within its limits. There must be express charter authority. Logan City *v.* Buck (Utah), 4 Am. & Eng. Corp. Cas., 300.

Intoxicating Liquors—Construction of Charter Provisions.—If there are provisions respecting the sale of intoxicating liquors in the laws of the State, a provision in the charter of a public corporation authorizing the making of all "by-laws that may be necessary to preserve the peace, good order, and internal police," does not warrant the passage of an ordinance, requiring a corporate license, and punishing persons who sell such liquors without being thus licensed. Comm. *v.* Turner, 1 Cush. 493; Comm. *v.* Dow, 10 Met. 382; *In re* Burnett, 30 Ala. 461. But see, State *v.* Clark, 28 N. H. 176; Heisembrittle *v.* Charleston, 2 McMullen (S. Car.) 233; State *v.* Ferguson, 22 N. H. 424; State *v.* Freeman, 38 N. H. 426; Megowan *v.* Comm., 2 Metc. (Ky.) 3.

Board of Aldermen of Opelousas *v.* Norman

Where, however, there are no State laws regulating the matter, power given by charter to pass "in general, every other by-law or regulation that shall appear to the city council requisite and necessary for the security, welfare, and convenience of the city, or for preserving the peace, order, and good government within the same," authorizes an ordinance to prevent shop-keepers, unless licensed by the city, from keeping spirituous liquors in their shops, or in any adjacent room. Heisembrittle *v.* City Council, 2 McMullen (S. Car.) Law, 233; City Council *v.* Ahrens, 4 Stob. (S. Car.) Law, 241; City Council *v.* Baptist Ch. 4 Strob. (S. Car.) Law, 306.

Power to regulate must be specially given. A provision limiting the amount that may be charged for liquor licenses by cities or towns, does not give the power. Cowley *v.* Rushville, 60 Ind. 24; Walter *v.* Columbia City, 61 Ind. 24; McFee *v.* Greenfield, 62 Ind. 21.

So, under peculiar circumstances, an ordinance prohibiting the sale of liquors during the continuance of divine service, was held invalid. Gillham *v.* Wells, 21 Alb. L. J. 319.

Provision of charter held to authorize an ordinance to forbid the sale of liquors. Clintonville *v.* Keeting, 4 Denio, 341; Thomas *v.* Mt. Vernon, 9 Ohio, 290; Goddard *v.* Jacksonville, 15 Ill. 588; Byers *v.* Trustees, 16 Ill. 35; Pekin *v.* Smelzel, 21 Ill. 464; Block *v.* Jacksonville, 36 Ill. 301.

Provision of charter held not to authorize absolute prohibition of sale of intoxicating liquors. Hill *v.* Decatur, 22 Ga. 203.

BOARD OF ALDERMEN OF OPELOUSAS

v.

NORMAN *et al.*

(*Supreme Court of Louisiana, March 20, 1899.*)

Nuisances—Ordinances.—The fact that a particular use of property is declared a nuisance by a town ordinance does not make it such unless it is in fact so, and is embraced within the common-law or statutory idea of a nuisance.

Same—Same.*—The thing or act complained of must come within the legal notion of a nuisance, and, where it does not, no authority

*See notes at end of case.

to remove or abate is derived from the ordinance declaring it a nuisance.

Same—Abatement—Police Power.*—But where a thing or act complained of is a nuisance, or must necessarily become such, a municipal corporation may, in the exercise of the police power, make regulations for its suppression and prohibition.

Same—Same—Same—Cattle Pens.*—Open cattle yards and pens within the corporate limits, where cattle in numbers are congregated and kept for feeding and fattening purposes, *held* to belong to that class of things which "must necessarily" become nuisances, and may be abated under a general prohibitive ordinance declaring it a nuisance to so keep cattle within the corporate limits.

(Syllabus by the court.)

APPEAL by defendants from mayor's court of town of Opelousas. *Affirmed.*

Kenneth Baillio, for appellants.

Lucius G. Dupre, for appellees.

BLANCHARD, J. The board of aldermen of the town of Opelousas adopted the following ordinance: "Resolved, that from and after this date it shall be considered a nuisance for any person or persons to keep or feed horned stock in a quantity of twenty-five or more, for marketing, shipping, or any other purpose, within the corporate limits of the town of Opelousas. Be it further resolved, that any person or persons violating this ordinance shall be fined twenty-five dollars and costs for the first offense, and one hundred dollars and costs for the second offense; said fine and costs to be collected by the mayor in the same manner that other fines and costs are collected." Affidavits charging violation of the ordinance were made against defendants, warrants issued, they were arrested, tried before the mayor's court, convicted, and fined $25 each. Both appeal. For the purpose of appeal their cases are consolidated by consent.

Case Stated.

The appeal is based on article 85 of the constitution of 1898, under which the appellate jurisdiction of this court extends to all cases in which the constitutionality or legality of any tax, toll, or impost whatever, or of any fine, forfeit-

ure, or penalty, imposed by a municipal corporation, shall be in contestation, whatever may be the amount thereof. The contention of appellants is that the municipal authorities exceeded their power in adopting the ordinance in question, that the same is *ultra vires*, and that the fine imposed under its provisions is illegal and unconstitutional. The contention of the town authorities is that the ordinance and its enforcement is a proper exercise of the police power in respect to the protection of the health, safety, and comfort of the inhabitants of the town. It will be observed that the keeping and feeding, itself, of horned cattle, within the corporate limits, is not declared by the ordinance a nuisance, and prohibited; but the keeping and feeding of cattle in numbers is. It is declared that such keeping and feeding of cattle in numbers aggregating 25 head or more is a nuisance. The ordinance, as to the keeping and feeding of cattle in such numbers within the corporate limits, is thus prohibitive, not regulative. Just there comes in the objection and contention of defendants. They dispute the power to enact a prohibitive ordinance on this subject. They acknowledge the power to enact a regulative one. In such a case as this, the jurisdiction of this court is confined to an inquiry into, and determination of, the question of legality or constitutionality of the ordinance imposing the fine, and for this purpose both the fact and the law of the case are open to examination and decision. But the extent to which this examination into the facts may go does not include the evidence on which the mayor's court founded its judgment as to the infraction *vel non* of the ordinance. With the facts of the case, in this sense, tending to show guilt or innocence of the accused, we have nothing whatever to do. State *v.* Callac, 45 La. Ann. 29, 12 South. 119; State *v.* Dean, Id. 441, 12 South. 489; State *v.* Fourcade, Id. 721, 13 South. 187. The examination, therefore, which we shall make of the facts of this case will be limited accordingly.

It appears that defendants have a pen or pens located within the corporate limits of the town; that the number of

cattle kept there was, usually, from 100 to 150 head; that these cattle were kept there for the purpose of feeding and fattening; that the pens are in close proximity to a cotton seed oil mill, from which cotton seed meal or cake and hulls are procured for feeding the stock; that the pens are distant not more than 300 or 400 feet from private residences; that they drain into a small stream or bayou, which runs through a part of the town; that the waters and banks of this stream are, and liable to be, unwholesomely affected by the same; that the pens are not kept in such condition as to prevent this; that there are no appliances for the removal of the urine and droppings of the cattle kept there, and the pens are not so arranged that the droppings and urine can be removed daily; that, where cattle are kept standing on the ground, it is impossible to remove the urine, which more or less becomes absorbed into the soil; and that it is not practicable to deodorize urine where cattle are fed on the ground. We construe the ordinance to mean that no person or persons shall keep 25 or a greater number of cattle in any one place, at a given time, within the corporate limits, and to declare the keeping of 25 head, or a greater number, in any one place, a nuisance. We are asked to declare it beyond the authority of the municipality to enact such an ordinance. We cannot do so. In saying this we fully appreciate that the fact that a particular use of property is declared a nuisance by an ordinance of a city or town does not make that use of property a nuisance unless it is in fact so, and is embraced within the common-law or statutory idea of a nuisance. Wood, Nuis. § 744. It is fully conceded that the thing or act complained of must come within the legal notion of a nuisance, and, where it does not, no authority to remove it is derived from the ordinance declaring it a nuisance. Id. § 744, and note. But where a thing or act complained of is a nuisance *per se*, or must necessarily become a nuisance, a town or city may, in the reasonable exercise of the police

Nuisances—Ordinances.

Same—Same.

power, make regulations for the suppression and prohibition of the same. When the thing sought to be abated is clearly a nuisance, one affecting or liable to affect the health of the town, the abatement may be made by the authorities of such town. The possession of very extensive powers for the abatement of nuisances detrimental to public health and safety exists, as part of the police power, in municipal corporations. City of New Orleans *v.* Wardens of Church of St. Louis, 11 La. Ann. 245; 1 Dill. Mun. Corp. § 141. Wherever protection to the lives, limbs, health, comfort, and quiet of the citizen and to his property is needed to be extended, there the police power reaches; and in respect of acts such as that complained of herein it rests upon the principle embodied in "*Sic utere tuo, ut alienum non lædas*,"—an accepted maxim, alike of the civil law and the common law. Open cattle yards and pens, located and maintained, as these are, within the limits of an incorporated town, where cattle in numbers are kept for a long period of time, to be fed and fattened for market, belong, we think, to that class of things which "must necessarily" become nuisances. It is within the ordinary experience of every observant man who has had opportunities for judging that they do, and the facts of the case at bar show that the pens in question are such. They are not safe-guarded by the conditions, appliances, equipment, etc., to prevent their becoming offensive, to obviate the noxious exhalations and noisome smells incident to such places, nor even to minimize the same. The drainage from the pens pollutes the stream which runs through the town, and is liable to affect the health of the locality. So we think it established that the particular use of the property in question, declared by the ordinance to be a nuisance, is "in fact" as well as in law a nuisance. Being such, the police power of the municipal corporation, operating through the ordinance attacked, and its enforcement, reaches it, and abates it. It being shown that the pens, as now

Same—Abatement—Police Power.

Same—Same—Same—Cattle Pens.

Notes

located, arranged, equipped, and maintained, are nuisances, it is no argument against the ordinance to say that under proper arrangement, equipment, and regulation the use to which the property is now put may become innoxious and unobjectionable. See 1 Am. & Eng. Enc. Law (2d Ed.) p. 65. If it be possible for these pens, harboring a large number of cattle, to be put in such condition as not to affect injuriously the health, the comfort, the quiet of the town, and they are so put, a case will be presented with respect to which the ordinance may, perhaps, have no application, and, were such a case now before us, a different result might be reached. We find no sufficient grounds for disturbing the judgment appealed from, and the same is affirmed.

NOTES.

Nuisances—Ordinances.—A city cannot arbitrarily by ordinance declare property a nuisance and destroy it, unless it is in fact a nuisance. When it is in fact not a nuisance, no authority to remove it is derived from the ordinance declaring it to be such. Yates *v.* Milwaukee, 10 Wall. (U. S.) 497; Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650; State *v.* Jersey City, 29 N. J. L. 170; Chicago *v.* Laflin, 49 Ill. 172; Babcock *v.* Buffalo, 56 N. Y. 268; Clark *v.* Mayor, etc., of Syracuse, 13 Barb. (N. Y.) 32; Wreford *v.* People, 14 Mich. 41; Pieri *v.* Shieldsboro, 42 Miss. 493; New Orleans *v.* St. Louis Church, 11 La. An. 244; Denver *v.* Mullen, 7 Colo. 345, 4 Am. & Eng. Corp. Cas. 304; Ward *v.* Little Rock, 41 Ark. 526, 8 Am. & Eng. Corp. Cas. 397. And this doctrine is supported by the following decisions: Yates *v.* Milwaukee, 10 Wall. (U. S.) 497, 123 Ill. 348; Roberts *v.* Ogle, 30 Ill. 459, 83 Am. Dec. 201; North Chicago City R. Co. *v.* Town of Lake View, 105 Ill. 207, 2 Am. & Eng. Corp. Cas. 6, 11 Am. & Eng. R. Cas. 42, 44 Am. Rep. 788; Everett *v.* Council Bluffs, 46 Iowa 66; Cole *v.* Kegler, 64 Iowa 59, 5 Am. & Eng. Corp. Cas. 361; Pieri *v.* Shieldsboro, 42 Miss. 493; Underwood *v.* Green, 42 N. Y. 140; Pye *v.* Peterson, 45 Tex. 312, 23 Am. Rep. 608; Miller *v.* Burch, 32 Tex. 208, 5 Am. Rep. 42; Denver *v.* Mullen, 7 Colo. 345, 4 Am. & Eng. Corp. Cas. 304; Vogt *v.* Mayor, etc., of Baltimore (Md.), 4 Am. & Eng. Corp. Cas. 329; River Rendering Co. *v.* Behr, 77 Mo. 91, 4 Am. & Eng. Corp. Cas. 320, 46 Am. Rep. 6; State *v.* Mott, 61 Md. 297, 4 Am. & Eng. Corp. Cas. 334, 48 Am. Rep. 105; St. Paul *v.* Gilfillan, 36 Minn. 298; Hennessy *v.* St. Paul, 37 Fed. Rep. 565; McKibbin *v.* Fort

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Smith, 35 Ark. 352; Ward *v.* Little Rock, 41 Ark. 526, 8 Am. & Eng. Corp. Cas. 397; Arkadelphia *v.* Clark (Ark. 1889), 27 Am. & Eng. Corp. Cas. 586; Mayor, etc., of Monroe *v.* Gerspach, 33 La. An. 1011; Evansville *v.* Martin, 41 Ind. 145; Crosby *v.* Warren, 1 Rich. (S. Car.) 385; State *v.* Jersey City, 29 N. J. L. 170; Dingley *v.* Boston, 100 Mass. 544; Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650; Van Dyke *v.* Cincinnati, 1 Disney (Ohio) 532; Glenn *v.* Baltimore, 5 Gill, J. (Md.) 429; Alpers *v.* Brown, 60 Cal. 447; Clark *v.* Mayor, etc., of Syracuse, 13 Barb. (N. Y.) 32; Everett *v.* Marquette, 53 Mich. 450; Wreford *v.* People, 14 Mich. 41; Joyce *v.* Woods, 78 Ky. 386; Boom *v.* Utica, 2 Barb. (N. Y.) 104; McCorwell *v.* Bristol, 5 Lea (Tenn.) 685; Appeal of McClain, 130 Pa. St. 546, 27 Am. & Eng Corp. Cas. 566; Wanstead Local Board *v.* Hill, 13 C. B., N. S. 479 Everett *v.* Grapes, 3 L. T. Rep., N. S. (Q. B.) 669.

It is said, however, that where a municipal corporation is authorized by its charter to remove and prevent nuisances, generally speaking, the only restriction upon that right is that what is done shall clearly be for the public health, safety and convenience. Roberts *v.* Ogle, 30 Ill. 459; Lake View *v.* Letz, 44 Ill. 81; Comm. *v.* Worcester, 3 Pick. (Mass.) 462; Dubuque *v.* Maloney, 9 Iowa 450; Commissioners *v.* Gas Co., 12 Pa. St. 318; Comm. *v.* Goodrich, 13 Allen, 546; Salem *v.* Railroad, 98 Mass. 431; Dingley *v.* Boston, 100 Mass. 544; Whyte *v.* Mayor, 2 Swan (Tenn.), 364; Williams *v.* Augusta, 4 Ga. 509; Mobile *v.* Yuille, 3 Ala. 137; New Orleans *v.* Philippi, 9 La. Ann. 44; People *v.* Albany, 11 Wend. (N. Y.) 539; St. Paul *v.* Colter, 12 Minn. 41; Collins *v.* Hatch, 18 Ohio, 523; St. Louis *v.* Bents, 11 Mo. 61; Taylor *v.* Griswold, 2 Green (N. J.), 222; Peck *v.* Lockwood, 5 Day (Conn.), 22; Phillips *v.* Allen, 41 Pa. St. 481; Baltimore *v.* Radecke, 49 Md. 217; King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89; Green *v.* Lake, 60 Miss. 451.

Same—Municipal Corporations—Power to Abate.—In Kennedy *v.* Phelps, 10 La. An. 227, it was observed that the power to abate nuisances is a portion of the police authority necessarily vested in the corporation of all populous towns. See also, State *v.* Heidenhain, 42 La. An. 7 So. Rep. 621; Louisville City R. Co. *v.* Louisville, 8 Bush (Ky.) 415; Hellen *v.* Noe, 3 Ired. (N. Car.) L. 493; Baker *v.* Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421. And in Hart *v.* Mayor, etc., of Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165, it was held that the corporation of a city may abate a public nuisance though no authority for that purpose is expressly given by the charter.

See generally North Chicago, etc., Ry. *v.* Town of Lake View, 2 Am. & Eng. Corp. Cas. 6; Rolfs *v.* Shallcross, 2 Am. & Eng. Corp. Cas. 191; City of Denver *v.* Mullen, 4 Am. & Eng. Corp. Cas. 304; River Rendering Co. *v.* Behr, 4 Am. &

Eng. Corp. Cas. 320; Vogt *v.* Mayor, etc., of Baltimore, 4 Am. & Eng. Corp. Cas. 329; State of Maryland *v.* Mott, 4 Am & Eng. Corp. Cas. 334; Cole *v.* Kegler, 5 Am. & Eng. Corp. Cas. 361; Village of Louisville *v.* Webster, 5 Am. & Eng. Corp. Cas. 367; Cain *v.* City of Syracuse, 5 Am. & Eng. Corp. Cas. 371; State *v.* Mayor, etc., of Knoxville, 5 Am. & Eng. Corp. Cas. 385.

Cattle Yards.—In the following cases cattle yards were held to be nuisances: Regina *v.* Wigg, 2 Ld. Raym. 1163; State *v.* Payson, 37 Me. 361; Cready *v.* McBroom, 32 Jur. (Sc.) 184; Com. *v.* Van Sickle, 4 Pa. L. J. 104; Com. *v.* Alden, 143 Mass. 113; Baker *v.* Bohannan, 69 Iowa 60; Trulock *v.* Merte, 72 Iowa 510; State *v.* Kaster, 35 Iowa 221; Ohio, etc., R. Co. *v.* Simon, 40 Ind. 278; Illinois Cent. R. Co. *v.* Grabill, 50 Ill. 241, 248; Sutterloh *v.* Mayor, etc., of Cedar Keys, 15 Fla. 306.

STATE

v.

CANAL & C. R. CO.

(*Supreme Court of Louisiana, June 21, 1898.*)

Requiring Street Railways to Water Tracks—Validity of Ordinance.*—An ordinance of the city council of the city of New Orleans which requires corporations operating street electric cars within the limits of the city, upon tracks laid down in the public streets thereof, to water their tracks so as to effectually lay the dust within their tracks, is a legal exercise of the police power of the city. Such an ordinance tends to promote the comfort and convenience of passengers, and the health and comfort of the inhabitants of the city.

Same—Reasonableness.—It is neither indefinite nor unreasonable.

(Syllabus by the Court.)

APPEAL by defendant from recorder's court of New Orleans. *Affirmed.*

Clegg & Quintero, for appellant.

James J. McLoughlin, Asst. City Atty., and *Samuel L. Gilmore*, City Atty., for the State.

*See note at end of case.

State *v.* Canal & C. R. Co

WATKINS, J. The defendant, through the instrumentality of its president, is prosecuted upon the charge of having willfully and unlawfully violated City Ordinance No. 13,835, C. S., by failing to water its tracks on Claiborne and Elysian Fields avenues, and other streets of the city which are traversed by its tracks, as required by said ordinance. On the trail the defendant was found guilty, and sentenced to pay a fine of $25, and in default of payment of the fine he was to suffer imprisonment for a period of 20 days in the parish prison; and from that sentence it prosecutes the present appeal to this court.

Case Stated.

In the recorder's court the defendant, through counsel, filed the following demurrer to the legality of the ordinance, *viz.*: (1) Because the city council was without power or right to enact such an ordinance. (2) Because the provisions of section 1 of same are so indefinite and unreasonable that no person or corporation therein described is able to know what is commanded to be done in pursuance thereof. (3) Because the same is an attempt on the part of the municipal authorities to exert an unreasonable exercise of the police power; and, if same be enforced, it would be unequal and not uniform in its operation, "in that it compels, or would compel, one class of persons using the public streets to perform a duty or service not required of other persons making a like use of the same streets." (4) Because it is unlawful and unreasonable "for the municipal authorities to transfer, or attempt to transfer, a public burden to private persons or corporations, and that the aforesaid ordinance is an offer or an attempt to make certain persons or corporations perform a service or duty, which service or duty should be performed by the municipal authorities, or under their direction. And said ordinance does not "require, or pretend to require, the performance of such service or duty by all private persons or corporations in like situation." (5) Because said ordinance attempts to compel the performance of a service without adequate compensation; and, if it is enforced, it will take the property and labor of a person or cor-

poration for the benefit of the city without compensation, and without due process of law. (6) This assignment is about the same as last. The demurrer further assigns that said ordinance is beyond the power of the city council, and is violative of the provisions of the constitution of the United States and of this state in this, *viz.*: That the defendant railroad company "acquired by purchase the right to run its cars on certain streets in the city of New Orleans, * * * and the right to maintain and operate its lines of cars, upon certain specified and agreed conditions, in the contract fully expressed, and the duty or obligation to water their tracks, as provided in section 1 of [said ordinance] No. 13,835, C. S., * * * forms no part thereof," and that said ordinance is an attempted impairment of their aforesaid contract rights, and, if enforced, it will seriously impair the same. It further assigns that the necessity of effectually keeping the dust laid on lines of street-car tracks, if such need there be, is one that "arises in the course of nature, and is not a state or condition created or brought about by the operation of said street cars," and consequently it is unlawful and unreasonable to impose upon a corporation operating street cars the duty of keeping the dust laid, it having no relation to the operation of the street cars under its contract; that, if it be in the interest of the public that the dust on the street-car tracks be kept down, it is unlawful and unreasonable, on the part of the city council, to require the company to perform this public service. This extended statement of the defendant's demurrer may be abbreviated and given more concisely in the following synopsis, thus: (1) That the ordinance is indefinite and unreasonable in terms, and an unreasonable exercise of the police power of the city is thereby contemplated. (2) That it is unequal and not uniform. (3) That it transfers a public burden to private persons. (4) That it requires the performance of a service without adequate consideration, and takes private property without due process of law. (5) That it is an impairment of its contract rights, in violation of the contract clause of the federal constitution. (6) That dust arises

in the course of nature, and is not caused or created by the operation of its cars, and consequently the ordinance unwarrantably and unreasonably imposes that duty upon it. On the other hand, it is the contention of the city attorney that the city council, in the exercise of the police power which is vested in the city of New Orleans, has the right to enact ordinances so regulating the use of streets by electric railways as to compel them to keep their tracks in such condition as to prevent a nuisance, and to protect the health, convenience, and comfort of its inhabitants; that an ordinance which requires street-car corporations to water their tracks so as to effectually keep down the dust thereon is definite and reasonable, and as such it is a valid and proper exercise of the police power. His further contention is: That the police power of a city cannot be alienated or bartered away by any contract, and consequently the city always retains the right to impose upon citizens and corporations—particularly upon those exercising and operating public franchises—the duty and burden of so conducting their operation and use as to promote the convenience and to protect the health and the comfort of the public; and it forms a necessary incident of the contract, which is read into it. That all persons, natural and artificial, are subject to the police regulations of the municipality in which they live. Two things are conspicuous upon casual inspection of the ordinance: (1) That its provisions exclusively deal with corporations operating lines of street cars within the city of New Orleans under franchises acquired from the city council; (2) and do not deal with any contract right, as such, corporations have acquired from the city under their franchises. The ordinance under consideration confessedly, and in terms, proposes an exercise of the police power under municipal regulation, and that alone. The questions which arise are the following, *viz.*: (1) Is the ordinance indefinite, unreasonable, or lacking in uniformity? (2) Does it transfer a public burden to private individuals or persons, or take property without due process of law or adequate compensation? The ordinance is couched in the sim-

plest form of words, *viz.*: "Be it enacted," etc., "that each and every company or corporation operating street-car lines within the limits of the city of New Orleans shall water their tracks so as to effectually keep the dust on same laid,"—providing a penalty for its violation. It is certainly neither indefinite, nor wanting in uniformity. It does not propose to take the private property of the corporation without due process of law.

After making the foregoing careful synopsis of the ordinance and the defendant's demurrer, our conclusion is that the two questions for consideration are (1) whether the ordinance is unreasonable; and (2) whether it was an attempt to place a public burden on private persons.

We may well premise the discussion by referring to the provisions of a prior ordinance on the same subject-matter, bearing the number 12,911, C. S., which was examined by this court in State *v.* New Orleans C. & L. R. Co., 49 La. Ann. 1571, 22 South. 839, as that ordinance and decision will serve to illustrate the one under consideration. It is as follows, *viz.*: "Be it enacted: that hereafter it shall be unlawful for any person, firm, or corporation to operate any electric, trolley or other cars or trains on the streets of this city without providing in some reasonable manner for the sprinkling of the streets through which their cars run." That ordinance contained a penal clause, which is as follows, *viz.*: "That any person, firm or corporation violating this ordinance, shall be guilty of a misdemeanor and shall be subject to a fine of twenty-five dollars, or thirty days in the parish jail, or both at the discretion of the recorder," etc. Ordinance No. 13,835, C. S., is an attempted reformation of Ordinance No. 12,911, C. S., so as to meet the interpretation which this court had placed upon it in the case cited. The differences between the two are radical, in several respects: (1) The later ordinance does not provide, as the prior ordinance did, that it shall be unlawful for any company or corporation to operate an electric car on a street of the city without providing for "the sprinkling of the streets through which their

cars run." (2) The later ordinance does not provide, as the prior ordinance did, that any firm or corporation violating its provisions should "be guilty of a misdemeanor." (3) The later ordinance simply requires that each and every corporation "shall water their tracks so as to keep the dust on same laid." After paraphrasing the prior ordinance, our opinion speaks of its operation in this wise, *viz.*: "The facts as developed by the testimony * * * are that by reason of the velocity of the car, and its weight, and its rapidly revolving wheels, volumes of dust are raised, and wafted by the winds to the streets adjacent to the tracks; that the clouds of dust are counter to the health and comfort of the inhabitants." From the large number of defenses and pleas which the defendant had urged in that case, as it has in this, our opinion selected that of unreasonableness and indefiniteness; resting the conclusions of the court mainly upon the authority of Yick Wo *v.* Hopkins, 118 U. S. 371, 6 Sup. Ct. 1064. Our opinion then says: "There is indefiniteness in the ordinance. It does not set forth with the least particularity what shall be done, or the extent of the service required, in order to escape the penalty it ordained should be inflicted for not sprinkling the streets. The failure or performance may vary each day, and in each locality where sprinkling may be required. No attempt was made to indicate how the work shall be done, the days the streets should be sprinkled, the capacity for sprinkling the sprinklers should have, and the number of sprinklings that should be applied each day, or at such time as may have been intended. Without a matured plan covered by the terms of an ordinance in regard to sprinkling streets, nothing good or useful can be accomplished. It will give rise only to confusion and failure. Authority must issue its orders with such clearness and definiteness that it may be understood, and the work required should be so specified that performance can be required in every locality, and from every one, under some defined rule. There should be some similarity in the work in each district. There cannot be under this

ordinance. There should be a measure of duty imposed, and those upon whom it is imposed should not be left to conjecture how much or how little they should do." The opinion then deals with the question of the equality and uniformity of the operation of the ordinance, and it thus proceeds: "This brings us to the objection that the ordinance is not equal and uniform in its operation, and imposes an unjust and oppressive burden upon a particular class of persons or corporations. In so far as relates to the work of 'sprinkling' the streets from curb to curb, less that portion over which defendant has a franchise, in our judgment the requirement of the ordinance is not equal and uniform. *Those streets are used by the public.* The work necessary to maintain their cleanliness,or to insure freedom from excessive dust, is a burden which the municipality cannot impose upon particular persons and corporations *only because they own a franchise over an adjacent way.* * * * The defendant cannot be compelled to clear and sprinkle streets not covered by its contract, and over which it has no franchise. The dust raised by defendant's cars, it may be, is carried by winds to the streets near. The evidence does not disclose that such is a fact. Presumably, however, it is; but defendant's cars are not the only vehicles which raise the dust, and it would scarcely be desirable equality to make it sprinkle all the dust." (Our italics.) As well illustrating the scope of that ordinance, the following extract from our opinion may be cited, *viz.*: "The question may be propounded: Can they not be made to sprinkle their own tracks, and relieve their own road, as well as the adjacent streets, of the dust raised by their cars? To this the answer immediately suggests itself: The ordinance being indefinite and uncertain, it would serve no purpose to decide in this case the issue raised by the question." The conclusion reached was that the ordinance was both indefinite and unreasonable, and consequently illegal, and that the penalty it provided could not be enforced.

This extended quotation from our opinion was considered

necessary for the purposes of showing that the ordinance was considered indefinite and unreasonable principally upon the ground that it should be unlawful for a corporation to "operate any electric, trolley or other cars or trains on the streets of the city without first providing, in some reasonable manner, for the sprinkling of the streets through which their cars run"; that is to say, from curb to curb. That provision required street-car companies to provide "in some reasonable manner for the sprinkling of the streets through which their cars run," notwithstanding they were at the same time used and employed for the general uses and traffic of the city. Simply because they exercised a franchise upon certain streets of the city, the ordinance singled out these corporations, and imposed upon them, solely and alone, the bearing of a public burden which should have been discharged by the city, or shared by the general public. Besides that, the terms of the ordinance, which required of street-car companies that they should provide "in some reasonable manner for the sprinkling of the streets," were most indefinite and indefinable as to time, manner, amount, and extent. The ordinance under present consideration is free of many of those complications, and it was doubtless the intention of the city council that it should be entirely disembarrassed by them. Recurring to its phraseology, we find "that each and every company or corporation operating street-car lines within the limits of the city of New Orleans shall water their tracks"; but not only so, but to water them "so as to effectually keep the dust on same laid." It is obvious that the duty imposed is specific; that is, "to water their tracks." It does not require them to "sprinkle the streets," nor to sprinkle their tracks; but to "water" them. Water them where, and to what extent? "So as to effectually keep the dust laid on same." To water that part of the streets which is occupied and used by their tracks, and immediately covered by their franchises, is an altogether different thing from sprinkling the streets from curb to curb, and to a very great extent, at least, relieves the ordinance of the onerous and oppressive feature that was properly attribu-

ted to the former ordinance,—the imposition upon private individuals and corporations of a public burden.

We are thus brought to the discussion of the sole remaining question in this case, and that is whether or not this ordinance evidences and authorizes a proper and legitimate exercise of the police power; for it must be admitted (and it is a question which is free from doubt) that, if it trenches in any particular upon the defendant's contract rights, it is inimical to the contract clause of the federal constitution. Among the powers which are expressly conferred upon the city council are the following, *viz.* : "That the council shall have power, and it shall be their duty to pass such ordinances, and see to their faithful execution as may be necessary and proper; * * * to regulate * * * all places of business likely to be or become detrimental to health; and to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health and to prevent the spread of disease; and to maintain a good sanitary condition in the streets, public places and buildings," etc. Acts 1896, No. 45, § 14 (the city charter). It specially provides that it is the duty of the city council to preserve the good order of the city, and "to maintain its cleanliness and health." *Id.* They are specially required "to suppress all nuisances." *Id.* That "the council shall have the power to authorize the use of the streets for railroads operated by horse, electric, steam, or other motive power, and to regulate the same," etc. *Id.* § 15, par. 13. The evident purpose and object of these and other provisions of the city charter were, in express terms, to subordinate the uses and franchises the city should have granted to street-railroad companies to its right to regulate the same, and keep them subject to its police dominion and control; for it cannot be reasonably contended that, because a corporation or private person has acquired the franchise of operating lines of electric cars in the streets of the city, such franchise carries with it the right to so use and operate their cars as to become detrimental to the public health of the city, and hence a public nuisance, and that the city council has not the

power to regulate the same by means of reasonable and appropriate ordinances. It is the right of use, and not of abuse, that the franchise confers. It is evident that the city cannot barter away her police powers; nor can she by her contracts estop herself from exercising the power of suppressing nuisances or preserving the public health and the comfort and cleanliness of the inhabitants of the city. It is equally evident that an ordinance which requires that a public business should be so conducted,or a public franchise so operated, as not to be detrimental to the public health or the cleanliness and comfort of the people of a city, does not deprive the owner of such a franchise of its property without due process of law or adequate compensation. That in the latitude in which the city of New Orleans is located, and in its physical situation, of which this court will take judicial cognizance, the operation of electric cars during a protracted summer season, where thousands of persons—particularly ladies and children—are constantly traveling in them, will produce a sufficient quantity of dust, in their operation, to constitute a nuisance to passengers, and become detrimental to public health, needs no demonstration. Of course, it is idle for the council to attempt to coerce those corporations to so operate their cars as to create no dust. That would be a physical impossibility. Hence the city council has attempted to do the only thing which, in our opinion, it was possible for them to have done; that is, to pass an ordinance requiring them, "to water their tracks so as to effectually keep the dust laid on same."

Following the rule which we have constantly adhered to in this class of cases, we have looked into the evidence for the purpose of ascertaining whether the dust is produced by the defendant's cars, or sensibly contributed thereto by them upon their tracks; for upon such evidence must depend the right of the city council to attempt to regulate the defendant's use of its franchise so as to preserve the health, comfort, and cleanliness of the people using its cars. In the first place, the record contains an agreement to the effect

"that all the testimony and evidence offered on the part of the New Orleans City & Lake Railroad Company and the city of New Orleans in the original suit, No. 15,559,"—the case from which we have made extracts *supra*,— be considered and received as offered "in the instant case, without being copied into this transcript," etc. The testimony of one of the defendant's witnesses in this case, as shown by the following interrogation, fairly illustrates the situation: "Q. How is the dust brought upon the car track? A. The dust is brought —or, rather, the wind is brought—on the car tracks by vehicles coming from unpaved streets, principally. There are also large quantities of manure, etc., dropped on the streets. Q. None of which is dropped by the electric cars? A. No, sir. Q. After a rain, and the streets become muddy, and the vehicles, as you say, by the mud being attached to their wheels, carry it and deposit it on the tracks, what becomes of it? A. The mud is dried first, of course, and the vehicles grind that mud into dust. Q. The vehicles grind the mud into dust? A. Yes, sir; other vehicles. Q. Vehicles alone? A. Vehicles and animals. Q. In what respect do the cars contribute towards grinding this mud into dust? A. To a very small extent,—only on the surface of the rails. Q. Is that appreciable? A. Well, it is only a matter of opinion. I don't think it does amount to anything. Q. After this mud is dry, and becomes ground into dust by vehicles and by the tramping of horses and mules, what becomes of it? A. Well, it stays on the street. *To a very large extent, the cars have a tendency to brush it off the tracks.*" (Our italics.) The witness thus described the situation after the cars have been operated on the streets for several days, and the drying process of fair weather has had its effect upon the mud which has been thus brought upon the railroad tracks: "Well, on a paved street there is a section between the rails—between the rails and gutter—which is comparatively clean. The dirtiest portion of the street is nearest the rails, inside and out; principally out, where the dirt is dropped from the wheels of the vehicles." Again:

"Q. With the exception of the few narrow streets to which you have referred, I understand you to say that the effect of a car passing over the roadbed after the mud has been ground and dried is to sweep, by its passage, the dust away from the car track. A. The effect is to clean the track." Obviously, the trend of this statement, and of other witnesses to the same effect, is to establish the fact that the cars of the street electric railway companies are an important factor in raising the dust which is complained of as a nuisance and a discomfort. This proof is consonant with common knowledge and experience on the subject. That the movement of the electric cars produces a great deal of dust is substantiated by the witness who testified in suit 12,559, to which we have referred. The following interrogations of a witness in that case will illustrate that proposition, *viz.*: "Q. Have you ever seen a street car run through the Third district? A. I think I have. Q. Well, have you? I say. A. Yes, sir; I have, certainly. Q. What line? A. Dauphine line; Dauphine and Barracks. Q. What effect did the passage of these cars have upon the dust of the streets? A. It has a great deal of effect. Q. Please state what the effect is. A. It creates a great deal of dust. Q. Is that dust uncomfortable? A. Very much, sir. Q. Do they create any more than any other vehicles passing in the street? A. Yes, sir." He says "there is a greater quantity of dust where the cars are running, and you can follow up behind every car in my street, and see rafters of dust after every car." Another witness says that through the streets that are ordinarily traversed by these cars "more dust is raised by them than by any other vehicle that I have seen traveling on the streets." This witness was a practicing physician in the city of New Orleans of 13 years' experience. "Q. What is the effect of these clouds of dust on the health of the inhabitants of those streets and the passengers in the cars? A. [Substantially that] inhaling of dust raised by those cars is irritating to the organs of respiration," etc. This witness confirms the

statement of the former witness with regard to the greater volume of dust which is produced by the electric cars than any other vehicles which use the streets of the city. The following is quoted from the interrogation of the president of the state board of health, *viz.*: "Q. Your board of health has requested the authorities to enforce this ordinance which the accused is charged with violating? A. No, sir; we attempted to enforce it ourselves, believing that we were capable of enforcing all ordinances connected with sanitation. Q. Now, you have noticed these cars going through the streets,—these electric cars? A. Yes, sir. Q. Do they create any dust,—more than any other vehicle? A. I think they are the cause of the dust arising. Q. Now, in the operation of those cars without sprinkling the streets, does that constitute a nuisance? A. I think it has an injurious effect upon the health. Q. Has the board of health ever declared this operation of the cars without sprinkling the streets a nuisance? A. I could not say that the specific action of the board stated that it was a nuisance, but the board did by specific action determine to enforce the law as a sanitary measure. Q. Now, when you say 'as a sanitary measure,' is the operation of the cars without sprinkling injurious to the health of the inhabitants? A. Well, the dust we conceive to be injurious. Q. It is? A. Yes, sir. Q. And it is more injurious, or is more injury caused by the dust from the street cars than from the dust from any other vehicle? A. By reason of the greater amount of dust." Again: "Q. Doctor, you have ridden around the city in street cars during dusty weather? A. Yes, sir. Q. Have you ever been inconvenienced by the dust in those cars? A. Yes, sir; frequently." Another witness, a member of the board of health, and a physician of 30 years' experience, said: "Q. You have often traveled in street cars of New Orleans City & Lake Railroad Company? A. Yes, sir; very often, all over the city. Q. Do they create any dust? A. Yes, sir; they do. Q. Do they create any more dust than any other vehicle passing

through those streets? A. I think so; by reason of the velocity of the car, which gives a kind of draught or vacuum, which causes large volumes of dust to surround the car."

So much of the evidence is sufficient for all the necessary purposes of this case, and, whether same be put to the practical test of the judgment of the layman and casual observer, or that of scientific analysis and sanitation, we think it reasonably clear that the operation of the street electric cars is the principal cause of the dust which is complained of, and that it is shown to be a nuisance, injurious to the public health, and that of persons who use them for purposes of travel, and detrimental to the comfort and convenience of the public. We regard the foregoing evidence as a complete answer to the following proposition, which we have extracted from the brief of defendant's counsel, *viz.*: "The defendant further shows that the need to keep the dust laid on the lines of track, if any such need there be, was a necessity that arose in the course of nature, and is not a state or condition brought about by the operation of the said street-car lines; and that it is unlawful and unreasonable to impose upon corporations operating said lines the duty to keep the dust laid when the said duty has no relation to the operation of the said street-car lines, and arises from no condition created or brought about by the operation of said lines, and when said service is not required by the contract with the city, and the duty of service is outside and beyond the contract, and a duty which is owed by the municipal authorities to the inhabitants." Again: "The Canal & Claiborne Railroad Company, the licensee of the city of New Orleans, has purchased and paid for the right to use certain streets for the carrying of passengers. It pays a license tax, as well as property tax, and is performing a *quasi* public function, carrying passengers for hire in the streets. The fact that it is *quasi* public, and has purchased and paid for this right to use the streets, does not destroy the character of its business,

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or make it subject to other and different rules of law than any other citizen who uses the street for profit. It would be unreasonable to require the dray owner to attach a sprinkling apparatus to his dray, or to require his dray to be followed by a water cart; and it would be unreasonable to require the omnibus lines to run sprinkling carts. It would be unreasonable to require of the procession of furniture vans, sugar wagons, cotton floats, and pleasure vehicles to be equipped with sprinkling apparatus, or to be preceded or followed by water carts, simply because they use the streets of the city. And so we say that there is no reason to require the street-car companies to perform this service, at great expense, when the service is not required of other persons or firms or corporations making a like use of such public highways. And when it is seen that the dust is not produced by the railway company,—is not brought upon the street by them,—but its appearance and the annoyance of the dust is not related to the operation of the railroad lines, to require them 'to lay' the dust would be no more reasonable than to require them to remove the garbage, sweep the streets, clean the gutters, or light and pave the streets, or maintain the police along their route." The examples counsel gives of the right which the proprietor of a dray, the water cart, the omnibus, furniture van, sugar wagon, cotton float, and pleasure vehicle has to the free use of the street for the purposes of his business are inappropriate, because neither exercises a franchise on the public streets of the city, but their use of the streets is just the same as that of any other private citizen. While each of said proprietors is licensed by the city to pursue his respective calling, his use of the streets is merely incidental thereto. But the street-car company purchases from the city a public franchise or right to lay its tracks of steel fixedly and permanently in the center of the public highways of the city, and to maintain same therein for a period of years, and to operate their cars thereon for the purpose of carrying passengers for hire. And it is disclosed by the evidence that the dust which occasions the inconvenience and dis-

comfort of the passengers and the detriment to public health is directly and immediately referable to its use of that franchise; and it is that injurious use and enjoyment of its franchise which the aforesaid ordinance is intended to regulate.

The question arises, upon the foregoing state of facts, whether the watering of the tracks of the street-railroad companies so as to effectually keep down the dust, as proposed in the ordinance, is an exercise of the police power. If so, is it reasonable, definite, and equal and just in its operation? The ordinance is merely a municipal regulation, and in no sense a criminal statute. Corporation of Amite City *v.* Holly, 50 La. Ann. 483, 23 South. 746. The persons with whom it exclusively deals are public corporations, who are operating public franchises to be operated as carriers of passengers for hire; and the evident object of the city council in enacting it was to improve the comfort and convenience of the passengers who were transported upon it, and incidentally to suppress a *quasi* nuisance, and preserve the public health. Same—Reasonableness.

It is further argued by defendant's counsel that the large expense of watering their tracks will render this ordinance so burdensome as to seriously impair its franchise, and render its revenues nonremunerative. To this proposition there are two sufficient answers: (1) That this exigency of defendant's franchise must be reasonably supposed to have been within the contemplation of the contracting parties when the franchise was secured, and, consequently, an incident thereof; (2) that the greatly increased convenience and comfort of travel which the suppression of the dust would occasion would entirely compensate the increased cost by a corresponding increase of travel. The principles of law appertaining to the exercise of the police power of a state or municipal government have been so frequently enunciated by the courts of this state, as well as by those of other states and of the supreme court, that the chief difficulty presented

to the judicial mind consists in the selection to be made therefrom of those most suitable to the question under discussion. It will therefore be useful to jurisprudence to quote from some of the most conspicuous decisions, and apply their precepts to the instant case. In Chaffe *v.* Trezevant, 38 La. Ann. 746, this court said: "What the police power of a state is, it is difficult to determine with precision. It is, generally said to extend to the protection of the lives, health, and property of the citizen, and the preservation of good order and good morals; to the promotion of domestic tranquillity, and the comfort and quiet of all persons. By the general police power of a state, persons and property are subject to all kinds of burdens and restraints in order to secure the general comfort, health, and prosperity of the people." In Bass *v.* State, 34 La. Ann. 494, it was well said that "it is a settled principle, growing out of well-ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their own property, nor injurious to the rights of the community." That opinion was very largely predicated upon the leading case of Com. *v.* Alger, 7 Cush. 53, which is cited in the brief of defendant's counsel. In the conspicuous case of Stone *v.* Mississippi, 101 U. S. 814, the supreme court said: "All agree that the legislature cannot bargain away the police power of a state. * * * Many attempts have been made in this court to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals." See, also, Beer Co. *v.* Massachusetts, 97 U. S. 25; Patterson *v.* Kentucky, *Id.* 501; Boyd *v.* Alabama, 94 U. S. 645; Fertilizing Co. *v.*

Hyde Park, 97 U. S. 659; Munn *v.* Illinois, 94 U. S. 124; Board *v.* Barrie, 34 N. Y. 657. The court then added this strong statement, *viz.*: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it; much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot devest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." In Dartmouth College *v.* Woodward, 4 Wheat. 518, CHIEF JUSTICE MARSHALL employed this forcible language, *viz.*: "The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them in respect to matters the government of which, from the very nature of things, must vary with varying circumstances. They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges or otherwise, *these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality. The contracts which the constitution protects are those that relate to property rights not governmental.*" (Our italics.)

The foregoing authorities, particularly the last, seem especially appropriate to this case. In making an application of these principles, one of the text writers says that the correct doctrine is "that, while the state may not prohibit a business, innocent in itself, when it is pursued in a lawful way, not injurious to the community; and while the police

regulation of pursuits and of the employment and uses of property must be limited to such restrictions as are reasonably necessary to protect legitimate public interests, and to secure, as far as possible, the largest freedom and the greatest good of all members of the community,—it is not within the authority of judicial tribunals to set aside laws enacted ostensibly to promote the public welfare, unless it is perfectly clear upon the face of the statutes, or from their terms, that they have no real or substantial relation to the objects to which they purport to be directed, or that they infringe upon and impair fundamental rights secured by constitutional guaranties." Parker & W. Pub. Health, § 9; Tied. Lim. § 2; Cooley, Const. Lim. pp. 177, 201; Davis *v.* State, 68 Ala. 58; State *v.* Wheeler, 25 Conn. 290; Boston *v.* Cummins, 16 Ga. 102; State *v.* Clottu, 33 Ind. 409; Humes *v.* Railroad Co., 82 Mo. 221; Bertholf *v.* O'Reilly, 74 N. Y. 509. "In other words," says the writer, "the right to exercise the police power cannot be alienated, surrendered, or abridged by a state legislature, by any act, grant, charter, contract, or delegation whatsoever; because, it is said, it is a governmental function, without which the legislature would be powerless to protect those rights, which it was especially designed to secure. So that the legislature cannot, even by charter granted to a corporation, confer any irrepealable right to continue the exercise of franchises in a way that may have become injurious to the public,"—citing Stone *v.* Mississippi, *supra*. In treating of the police control of corporations, MR. TIEDEMAN says: "It has been supposed that, because it is the settled law of this country that the legislature of a state cannot repeal or amend the charter of a private corporation, unless the power is expressly reserved, these perpetual corporations are placed beyond the reach of the ordinary police power of the state; that, while the rights of the natural person are subject to the exercise of the police power in the interest of the public, those corporations are free from this burden, because the slightest police regulation operates as a restriction of the enjoyment of the corporate

franchise, and hence impairs the obligation of the contract. Such a construction of the operation of this constitutional provision is not only scientifically absurd, but it is in violation of the ordinary rules of constitutional construction, which provide for a strict construction of all grants by the state to the individual. Apart from the question whether the state can barter away its police power, the intention of the legislature to place a private corporation beyond the reach of the police power of the state, to grant to a corporation the right to do what it pleases in the exercise of its corporate powers, it matters not how much injury is inflicted upon the public, and yet be subject to no control or restraint which is not provided by the laws in force when the charter was granted, is so manifestly unreasonable that we cannot suppose that the legislature so intended, unless this extraordinary privilege is expressly granted. * * * The subjection of *existing corporations to new regulations does not involve a repeal or amendment of the charters, for an act of incorporation simply guaranties the right* to act and do business as a corporate body, *subject, of course,* to the laws of the *land, and the legitimate control of the government.*" (Our italics.) Tied. Lim. §§ 189, 190. These two sections of that excellent treatise are largely drawn from the conspicuous Louisiana case. Butchers' Union Slaughter-House Co. *v.* Crescent City Live-Stock Landing Co., 111 U. S. 746, 4 Sup. Ct. 652. In that case the court broadly and emphatically said that the legislature of a state "cannot, by any contract, limit the exercise of its police powers to the prejudice of the general welfare. These are the public health and the public morals. The preservation of these is so necessary to the best interests of the social organization that a wise policy forbids the legislative body to devest itself of the power to enact laws for the preservation of the health and the repression of crime." The author again says (section 191): "But the corporation is no more subject to arbitrary regulations than is the individual. In order that the regulation of a corporation may be within the constitutional limitations of

the police power, it must have reference to the welfare of society by the prevention or control of those actions which are calculated to inflict injury upon the public or the individual. As in all other cases of the exercise of the police power, the police regulations of corporations must be confined to the enforcement of the maxim, '*Sic utere tuo ut alienum non lædas*,' subject to the observance of which every corporate charter must be supposed to have been granted." The foregoing principles were sanctioned by this court in State *v.* Heidenhain, 42 La. Ann. 483, 7 South. 621, in which it was said by the court: "The police power delegated to the city of New Orleans in its charter gives ample authority to the city to maintain its cleanliness and health, and to maintain good sanitary conditions in the streets; public places, and buildings, to suppress all nuisances, and to impose a fine and imprisonment for the violation of such ordinances," etc. Again: "The authority to abate nuisances is a part of the police power vested in all large and populous cities. To determine what is a nuisance is a question of fact." In that case this court maintained, as a valid and reasonable exercise of the police power of the city of New Orleans, an ordinance prohibiting smoking in the street cars of the city. In State *v.* Lochte, 45 La. Ann. 1405, 14 South. 215, this court maintained the legality of an ordinance of the city of New Orleans which prohibited private individuals from obstructing the streets and banquettes of the city, as an exercise of the police power of the city.

But, in addition to the foregoing authorities on the general principles of law applicable to this kind of a case, we have been referred to a case in point (City & Suburban Ry. Co. *v.* Mayor, etc., of Savannah, 77 Ga. 732), and from the statement in the opinion it appears that the appellant was fined by a city police court on the charge of "neglecting to water the track on which it ran through the streets of the city." The court said: "Surely, to keep down the dust from the railway's own tracks, by watering them, within the city limits and on its streets, is a very requisite and neces-

sary thing for the welfare and convenience of the inhabitants on the streets over which the road is constructed, to say nothing of its health-preserving effect. The cars constantly run. Almost every minute they pass each house on the street, and, if the track be left unwatered, the dust becomes very inconvenient to those who lodge in the houses, and in warm weather sit on the stoops or open the windows." The court sustained the ordinance as legal, and rested their conclusions mainly upon Railroad Co. *v.* Richmond, 96 U. S. 521, in which the court held that "the appropriate regulation of the use of property is not 'taking' it, within the meaning of the constitutional prohibition." JUDGE DILLON, in a recent edition of his work, approves the decision of the Georgia court, and says: "Under its police power and authority over streets, a city may require street-railway companies to keep their streets watered, so as to be free from dust." 2 Dill. Mun. Corp. (4th Ed.) § 720. McDonald *v.* Railway Co., 20 C. C. A. 332, 74 Fed. 104, announces a similar doctrine. A similar ordinance was sustained by the Pennsylvania court recently, in Chester *v.* Traction Co., Am. Dig. 1897, p. 4928. On reason and authority, we are of opinion the ordinance of the city council of the city of New Orleans must be sustained as a legal exercise of the police power, and as neither indefinite nor unreasonable. Judgment affirmed.

NOTE.

Street Railways — Municipal Regulation—Watering Tracks.—A provision in the charter of a city giving it power "to make, ordain, and establish such by-laws, ordinances, rules, and regulations as shall appear to them requisite and necessary for the security, welfare, and convenience of the city and its inhabitants, and for preserving health, peace, and good government within the limits of the same," gives it authority to pass an ordinance requiring street-car companies to keep their tracks watered so as to lay the dust. City & S. R. Co. *v.* Mayor, etc., of Savannah, 77 Ga. 731, 4 Am. St. Rep. 106.

MILWAUKEE ELECTRIC RAILWAY & LIGHT CO.
v.
CITY OF MILWAUKEE.

CENTRAL TRUST CO. OF NEW YORK
v.
SAME.

(*Circuit Court E. D. Wisconsin, May 31, 1898.*)

Street Railways—Authority of City to Establish Rates.—A street railway corporation is a person within the meaning of the fourteenth amendment of the constitution of the United States, and, consequently, no city has authority to establish unreasonably low rates for the transportation of passengers by street railways.

Same—Constitutionality of Statute.—The ordinance of June 11, 1896, of the City of Milwaukee regulating the rate of fares upon the street railways in such city, is, with respect to the complainant street railway company, repugnant to such constitutional provision, the rates established thereby amounting to confiscation.

Miller, Noyes, Miller & Wahl, Winkler, Flanders, Smith, Bottum & Vilas and *W. J. Curtis*, for complainant.

Howard Van Wyck, for defendant.

SEAMAN, District Judge. The main controversy in each of these actions is whether the ordinance of June 11, 1896, unreasonably fixes rates of fare which would deprive the complainant of its property without due process of law, and thus violates the fourteenth amendment to the constitution of the United States. A further question is raised by the bill filed on behalf of the bondholders, and is pressed by argument in support of both bills, whether the municipality had power to regulate rates beyond the provisions contained in the several franchises which are vested in the complainant street-car company, limiting only to a five-cent fare. Both contentions are of serious import,

Case Stated.

*See note at end of case.

involving, on the one hand, consideration of the rights of the community in respect of a great public utility, and the interference with acts of municipal control, which are presumptively inviolable; and, on the other hand, affecting the preservation of private rights of property, where investment has been made in a great undertaking of public nature, on the faith of existing and probable conditions, and where, by reason of its nature, there can be no withholding of operation by the company, even if unremunerative. Ames *v.* Railway Co., 64 Fed. 165, 177; Wright *v.* Railway Co., 95 Wis. 29, 36, 69 N. W. 791. Further investigation has confirmed the impressions stated at the hearing, that the constitutional question was so clearly presented by the pleadings and testimony, and was so distinctly of federal cognizance, that it should be first considered. Certain rules to interpret and apply the limitations of the constitution in this class of cases are well settled by decisions of the supreme court. If the state of facts shown by the evidence clearly establishes a case of impairment within these rules, it will be unnecessary to pass upon the complicated question of general power, as one of first instance, calling for the interpretation of various statutes and ordinances.

The ordinance under consideration provides that tickets shall be sold, good for one fare, including one transfer, "in packages of six for twenty-five cents, and twenty-five for the sum of one dollar," thus making a reduction of the regular five-cent rate to all who so purchase tickets. Assuming, therefore, without so deciding, that the general power to fix and regulate the terms and rates to be charged subsists in the municipality,—namely, that by delegation it became vested with and still retains the full extent of legislative power undoubtedly possessed by the state,—there can be no inquiry here as to the wisdom or good policy of exercising the power so delegated, that being a matter of municipal discretion, over which the courts have no right of supervision or review. Nor is it open to inquiry in this case whether there is a public demand or need for the enactment, or whether it

is just and reasonable in all its provisions, except for the single purpose of ascertaining its infringement of rights which are guarantied to the complainant by the constitution.

Upon this record it must be taken as true that enforcement of the ordinance would operate to reduce materially the net revenues of the street-car company. There is effort on the part of the defendant to show that the probable increase of passengers through the method of commutation tickets would make up for the reduction in rate, but no reliable basis is furnished, and the argument is too speculative for acceptance; while on the part of the complainant the testimony is founded upon practical and varied experience, and clearly shows it to be improbable that any increase in travel would yield receipts, over and above the additional expense necessarily entailed, to offset the decrease in gross receipts appearing *prima facie* from the reduction in fares. The claims are that a loss of income would result of "somewhere between 10 and 15 per cent. of the gross earnings," and estimates are presented by several witnesses of a net loss ranging from $87,000 to $140,000 per annum. It is sufficient, for the present consideration, that the ordinance must be regarded as a measure which reduces the rates of fare materially, and consequently would impair materially the net revenue produced by the property, and no analysis of the testimony upon that point is necessary, nor is any attempt required to state, even approximately, the amount of loss.

Street Railways—Authority of City to Establish Rates.

The law which must govern, when the facts are determined, is concisely and pertinently stated in the opinion by MR. JUSTICE HARLAN, speaking for the supreme court, in Smyth *v.* Ames, 18 Sup. Ct. 418, 426, as follows:

"In view of the adjudications, these principles must be regarded as settled: (1) A railroad corporation is a person, within the meaning of the fourteenth amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (2) A state enact-

ment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad, that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the constitution of the United States. (3) While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

And this opinion reviews the line of decisions upon the subject, and clearly approves the application of the same doctrine to legislative regulation of charges over toll roads, in Road Co. *v.* Sandford, 164 U. S. 578, 594, 17 Sup. Ct. 198. Therefore it must be regarded as established beyond question that the power to regulate the rates of fare, which is here assumed to rest in the municipality, is subject to these limitations: (1) That there is reasonable need on the part of the public, considering the nature and extent of the service, of lower rates and better terms than those existing; (2) that the rates and terms fixed by the ordinance are not clearly unreasonable, in view of all the conditions. Neither of these considerations is independent of the other, and, although the public interest is of the first importance, the test is not what is desirable upon the part of either, but what is reasonable in respect of the rights of both. As stated in Smyth *v.* Ames, *supra*: "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be

exacted from it for the use of the public highways than the service rendered by it is reasonably worth." So, in Road Co. *v.* Sandford, *supra*, it is clearly held, in the same view of mutual consideration, that it is neither the right of the corporation to subject the public "to unreasonable rates in order simply that stockholders may earn dividends," nor of the public to have the use of the conveniences thus furnished except "upon payment of such tolls as, in view of the nature and value of the service rendered by the company, are reasonable," but that "each case must depend upon its special facts"; and the reasonableness of rates must be measured by all the conditions, including, of course, the reasonable cost of operation and of maintenance "in good condition for public use, and the amount which may have been really and necessarily invested in the enterprise."

The difficulties presented in this case do not, therefore, rest in any doubt as to the general principles which must be observed, nor in ascertaining the actual facts disclosed by the testimony as a whole, so far as material to this controversy. Although the testimony on the part of complainant makes a volume of 1,445 printed pages, and that of the defendant 163 pages, the only substantial contentions of fact relate to items of expenditure and claims of credit by way of depreciation, presented on behalf of the complainant as entering into the showing of net revenue, and to the present or reproduction value of the plant. And it may be remarked, in passing, that this testimony is so well classified and indexed, with such fair summaries in the briefs, that the tasks of examination has been materially lightened. But the sole embarrassment in the inquiry arises from the wide divergence which appears between the actual and undisputed amount of the cash investment in the undertaking, and the estimates, on either hand, of the amounts for which the entire plant could now be reproduced, in the view that the line of authorities referred to does not attempt to define or specify an exact measure or state of valuation, and leaves it, within the principles stated, that "each case must depend

upon its special facts." Therefore the twofold inquiries of reasonableness above indicated are of mixed law and fact, and start with the presumption, in favor of the ordinance, (1) that the prevailing rates exacted too much from the public, and (2) that those prescribed are reasonable.

1. Are the terms and rates fixed by the company excessive demands upon the public, in view of the service rendered? The Milwaukee Street-Railway Company, of which the complainant is the successor in interest, was organized in December, 1890, for the purpose of establishing an electric street-railway system, which should cover the entire field for the city of Milwaukee. There were then in operation five distinct lines, owned separately, operated mainly by horse or mule power, each charging separate fares, and having no system of transfers. It is conceded that the service was slow and antiquated, was not well arranged for the wants of the city, and was generally inadequate and unsatisfactory. As the old lines occupied the principal thoroughfares, and the public interest prevented the allowance of double lines in such streets, the improvement could not be made effective unless those lines were purchased, or in some manner brought into the proposed system. They were gradually acquired, at prices which may appear excessive when measured by results, and during the ensuing period of about three years the work of installing the new system was carried on, involving an entire reconstruction and rearrangement of the old lines and extensions, and new and improved equipments throughout, at an expenditure of over $3,000,000, aside from the costs of the old lines. As a result, at the time the ordinance was adopted, the mileage of tracks had increased from the previous aggregate of 110 miles to 142.89 miles, reaching every section of the city, with shorter and better routes, and furnishing 38 transfer points, with a universal transfer system,—a feature of special value to the public, as a single fare of five cents gives a maximum length of ride more than double the old arrangement. The service was improved in speed and regularity 50 per cent. or more,

with better cars and less inconvenience, and it appears beyond question that it was generally more satisfactory and economical from the standpoint of the public. In other words, the service was materially enhanced in its value to the public, without any increase in either normal or maximum charges, affording rides for five cents which had previously cost two and even three fares; and against all these advantages there appears only a single benefit extended by three out of the five constituent companies which is not given under the new arrangement, namely, in the sale of commutation tickets,—an omission for which there seems to be plausible excuse and offset in the universal system of transfers, aside from the other advantages. Surely, therefore, no imposition upon the public appears through any comparison between the old and the new service and rates. Nor does it find any countenance in comparison with either service or rates which prevail in other cities, for it is shown in this record, and is undisputed, that the five-cent rate is almost universal; that commutations are exceptional in cities of like class, and arise out of exceptional conditions, which are not fairly applicable here; and that instances of lower rates are so clearly exceptional that they cannot have force for any affirmative showing of reasonableness in the instant case. Nevertheless, with the burden of proof on the defendant, these considerations are not controlling, unless it further appears that the earnings of the company are insufficient, in view of the amount which may justly be regarded as the investment in the undertaking, to warrant the making of rates and terms which are more advantageous to the public. The interests of the public in its highways are paramount, and, if the service can reasonably be afforded more cheaply in Milwaukee than in other cities of like class, the community is entitled to the just benefit of any possible conditions which may tend to that result. The issue in that regard must be met under the second branch of inquiry, but I am clearly satisfied that this

first question must be answered in favor of the complainant, if the evidence sustains its claim that lower rates would be confiscatory, and not compensatory.

2. Are the earnings of the property insufficient, in view of all the conditions, to justify this reduction in the rates of fare? Solution of this inquiry depends upon the showing (1) of earning capacity at existing rates, and (2) of the "amount really and necessarily invested in the enterprise," and upon the conclusion (3) whether the ratio of return upon the investment is excessive. In the statements which are referred to both parties have adopted a ratio, so far as necessary, to separate the electric lighting plant owned by the complainant, so that the statements which follow relate exclusively to the street-railway plant, except where otherwise mentioned.

Same—Constitutionality of Statute.

First. The question of earning capacity is confined by the testimony to the results of three years' operation, being after the system was fairly installed, and inclusive of the year in which the ordinance was adopted, namely, 1894, 1895, and 1896. It is suggested on behalf of the defendant that those years were exceptional, for one cause and another, and are not a fair criterion for future earnings under more favorable circumstances; but the suggestion is without force in this case, because the ordinance operates upon these very conditions, and must, of course, be predicated upon them,—upon existing facts, and not upon mere future possibilities,—and, so determined, the instant case cannot affect rights under new conditions.

The proofs on the part of the complainant furnish, in detail, from the books of account, the gross earnings, the various items of expense and of charges for which deduction is claimed, excluding any payments of, or allowance for, interest on the bonded indebtedness, and state the net earnings as follows: In 1894, $64,868.77; in 1895, $269,202.30; in 1896, $100,628.81. In this showing it appears that deduction of $247,324.88 is made in 1894 for "depreciation," being the amount apportioned in that year to meet the alleged annual

loss by physical depreciation of the plant, to keep the capital intact. No such deduction is made in 1895 and 1896, because not shown in the books, although it is insisted that like credit is due in each year, for the purposes of this case.

The defendant concedes the correctness of the showing as to the gross earnings, but disputes certain large items for which deductions are made in the above statement, corrects some items, and denies that any allowance should be made for depreciation. Aside from the fact that reports and statements of financial condition made from time to time by the company omit many of the deductions here asserted, these contentions on the part of the defendant rest solely upon the books of account kept by the company, and the testimony of Mr. De Grasse, stating his conclusions as an expert accountant from examination of such books, with the following result as to net earnings: In 1894, $387,074.70; in 1895, $479,621.11; in 1896, $666,520.99. But this total for 1896 erroneously includes an allowance of $160,560 paid for interest on bonds, which should be excluded on the basis assumed, and would make the net earnings for that year on his computation, $227,070.99. In this statement the allowance for depreciation in 1894 is excluded by Mr. De Grasse, because that item was in fact charged off upon change in the system of bookkeeping. He also excludes large amounts of undoubted expenditures upon the hypothesis that they belong to "construction account," as covering permanent improvements, and not to "expense of maintenance," as stated; rejects certain payments as accruing on account of previous years, and certain sums apportioned and charged off to meet damage claims; and makes corrections as to taxes, for which the book entries were made in advance upon estimates by way of apportioning the expenses of the year, pending litigation and other causes. However valuable this testimony is for analysis of the bookkeeping methods and for correction of certain charges, it is clearly insufficient, without other support, to contradict the undisputed testimony, both positive and expert, on the part

of complainant, which verifies substantially its contention upon the disputed subjects of deduction, namely, that the expenditures so charged were largely, if not wholly, of such nature as to justify deduction for "maintenance"; and that depreciation is a well-recognized fact in all such plants, for which allowance must be made to save the capital from impairment, without regard to any question of its entry upon the books.

Making allowances for maintenance alone, in accordance with the analysis presented by the expert witnesses Goodspeed, Coffin, McAdoo, and Beggs, taking in each instance the estimate most favorable to the defendant, I am satisfied that the defendant's claim of net earnings must be materially reduced, and that the largest amounts which can be assumed upon its theory, excluding any allowance for depreciation (except that for 1894 the "maintenance" allowance is increased, to bring it—the general allowance—up to the minimum estimate by the experts), would approximate the following sums:

In 1894	$230,000
In 1895	340,000
In 1896	115.000
	$685,000

—Making the average earnings per year, say, $228,333.

In reference to the element of depreciation, the witness Beggs gives the following explanation:

"I think experience has demonstrated that the utmost life that can be expected from the best roadbed that can be laid to-day would be, at the outside, ten to twelve years, when it would have to be almost entirely renewed. The Milwaukee Company is in that condition to-day, because of the different periods that their track went down, and due to the fact that it was not all put down at one time, and it must now of necessity commence to lay about 12 miles of track annually, being about one-twelfth of its total mileage; and will be required, whether they wish to or not, to lay that amount annually hereafter, and will thereby be keeping their tracks

fairly up to the standard. The same applies, I might say, to the equipment. In my estimate I have calculated that the Milwaukee Company must do this year, which, as a matter of fact, it is doing, what it did last year,—in other words, put on not less than 20 of the most modern, best-constructed equipments, thereby keeping its standard up to the minimum it has now, of 240 equipments; because I think it is fair to assume that the average life of the double equipment, taken as a whole, will not exceed 12 years, the life of the motor being somewhat less than that, and that of the car we hope may exceed it possibly several years,—I mean the car bodies; but that, in the main, we hope that we will get an average life of twelve years out of them. So, taking 20 equipments annually, you would keep to your standard of 240 equipments, which is absolutely necessary to maintain—to operate —the Milwaukee Street Railway. I mean cars complete, with motors and complete electrical equipment."

For the causes thus stated, within general rules which are well known, it is manifest that this element must be taken into account before it can be determined that earnings derived from a plant are excessive; and in the same line there is much force in the argument of counsel that consideration should also be given to the factor of depreciation by amortization of franchises, as all the franchises in question terminate in the year 1924. The latter item, if allowed, would be a matter of simple computation; but a just measure of physical depreciation seems, to some extent, although only partially, involved in provisions for maintenance, and, while the testimony is very full and instructive upon this subject, it does not clear the case from serious difficulties in the way of stating a definite ratio or sum for such allowance. I am, however, clearly of opinion that neither of these elements is essential to the determination of the issues upon any aspect presented by the testimony, and that depreciation may be left to serve as an important factor of safety, in either view.

Second. As to valuation: For purposes of the company, the value of the property, including both railway and light-

ing plants, appears to have been placed at $14,250,000, represented by the issue of bonds for $7,250,000; preferred stock, $3,500,000; and common stock, $3,500,000; but this aggregate was clearly excessive, after excluding the electric lighting department, and on no view can it be taken as the basis for the present consideration. The statements of the actual cost of the constituent street-railway properties, including the cash investment for improvements, are necessarily complicated, from the fact that payments were partly made in stocks and bonds, and the aggregate amount varies according to the ratio of valuation placed upon the bonds alone,—in two statements in which the stock is excluded, and in one statement which values both stock and bonds,—the minimum being $9,024,107.85, and the maximum $11,313,829.84. The former amount was subsequently modified (page 465, Complainant's Proof), making the statement of cost $8,885,644.17; and as this excludes any valuation of stock, and places the value of the bonds at the discount agreed upon between the parties, which also seems fair, it may justly be taken as representing the true amount invested. But adoption of this purchase amount does not meet the issue, as it is the value of the investment, and not the amount paid, which must control. On the other hand, both parties introduce testimony placing valuations upon the various items of the plant as it exists in fact, upon the basis of its reproduction value. This amount, as stated by the witnesses for complainant, aggregates $5,153,287.76; while, on the face of defendant's proofs, the value of the tracks and equipment is placed at $2,358,799; the real estate and buildings being valued separately, and the highest valuation of the real estate being $236,949, and of the buildings $208,449, making the aggregate $2,804,197. It appears, however, that these estimates on behalf of the defendant omit 27 miles of track, many parcels of real estate, and other items, so that counsel for defendant concedes that this aggregate should be increased to $3,679,631. The wide difference in these amounts is mainly due to divergence in the estimates upon

tracks and equipment. So the amounts on real estate and buildings, after allowance for the omissions, would appear higher on the valuations submitted by the defendant than those of the other side. For the valuation of tracks and equipment, the defendant relies upon the estimate made by Mr. Partenheimer, a witness of apparent ability and experience as a street-railway contractor, engaged in business at Chicago; but his examination of the plant was cursory, being made within three days, and could not give the detailed information upon which a just estimate for this inquiry must be based, and it is conceded that he left out of consideration many important items (aside from the error in mileage) which should enter in and would greatly increase the amount as estimated on his basis. Both upon its face and by reference to other source of information, this estimate is far below any fair valuation, for the purpose in view, either at the sum stated by the witness, or with the additions conceded on behalf of the defendant; the former amount being in fact $320,000 short of the actual cash expenditures by the company for construction and equipment. Opposed to this, the estimate for complainant is made by Mr. Clark, an expert of distinction in this line, who gave weeks to the examination, with the aid of a corps of assistants, and presents the results in detailed statements, so that his testimony and estimates impress me as well founded; and they are supplemented and supported by the testimony of Mr. Coffin, Mr. Payne, and other witnesses, and by comparative showing of mileage valuations in Massachusetts, which appear in the noteworthy system of reports published by that state. I am satisfied that the property of complainant represents a value, based solely upon the cost of reproduction, exceeding $5,000,000. And I am further satisfied that this amount is not the true measure of the value of the investment in the enterprise. It leaves out of consideration any allowance for necessary and reasonable investment in purchase of the old lines and equipments, which were indispensable to the contemplated improvement, but of which a large part was of such nature that it does not count

in the final inventory. No allowance enters in for the large investment arising out of the then comparatively new state of the art of electric railways for a large system, having reference to electrical equipment, weight of rails, character of cars, and the like, of which striking instance appears in the fact that the electric motor which then cost about $2,500 can now be obtained for $800; so that work of this class was in the experimental stage in many respects, and the expenditures by the pioneer in the undertaking may not fairly be gauged by the present cost of reproduction. Of the $5,000,000 and over paid for the acquisition of the old lines, it would be difficult, if not impossible, from the testimony, to arrive at any fair approximation of the share or amount of tangible property which enters into the valuation in this inventory. It does appear that the roadways required reconstruction with new rails and paving, and that the amount stated was actually paid by the investors, making their investment nearly $9,000,000. How much of this may be defined or apportioned as the amount which was both "really and necessarily invested in the enterprise" (*vide* Road Co. *v.* Sandford, *supra*) I have not attempted to ascertain, except to this extent: that I am clearly of opinion that at least $2,000,000 of those preliminary expenditures are entitled to equitable consideration, as so invested, beyond the reproduction value, if the valuation of the investment is not otherwise found sufficient for all the purposes of this case, but no opinion is expressed in reference to the remaining $1,885,644.

Third. The final inquiry, whether the net earnings shown are in excess of or equal to a just return upon the investment, presents no serious difficulty, under the premises above stated. Assuming $5,000,000 as the basis of investment, the ratio of earnings would be as follows: (1) At the extreme computations of defendant, the yearly average would be $364,000, which would yield .072 per cent.; (2) at the complainant's figures, after adding the corrections for taxes, the return would be .033 per cent.; (3) at the amounts which are above stated as my deductions from the testimony,

Note

the yearly average, being $228,333, would make .045 per cent. Assuming $7,000,000 as the basis, the ratio of earnings would be, upon each of said versions, as follows: For the first, .052 per cent.; for the second, .023 per cent.; for the third, .032 per cent.

The interest rate fixed in the bonds issued by the company is 5 per cent. The rate which prevails in this market, as shown by the uncontroverted testimony, is six per cent. for real-estate mortgages and like securities. If the $5,000,000 basis be adopted, surely a better rate must be afforded for the risks of investment than can be obtained on securities of this class, in which there is no risk. Upon the basis of $7,000,000, which is more logical and just, the 5 per cent. named in the bonds is clearly not excessive, and should be accepted by a court of equity as the minimum of allowance; and, even upon the defendant's partial showing, the return would be less than one-quarter per cent. above that, with the large margin for depreciation left out of account.

I am of opinion that the testimony is not only convincing in support of the material allegations of the bill, but is uncontradicted and conclusive that the improved service received by the public, with the universal system of transfers, is well worth the five-cent rate charged therefor; that the company has not received earnings in excess of an equitable allowance to the investors for the means necessarily invested in furnishing such service; that enforcement of the ordinance would deprive complainant of property rights, by preventing reasonable compensation for its service; and that, therefore, the ordinance clearly violates the constitution of the United States, and is invalid. Decree must enter accordingly, and for an injunction as prayed in the bill.

NOTE.

State Regulation of Rates—Fourteenth Amendment.—In Smyth, Att'y Gen., *et al. v.* Ames *et al.* (U. S.), 10 Am. & Eng. R. Cas., N. S., 1, MR. JUSTICE HARLAN, delivering the opinion of the court, said: "By the fourteenth amendment it is provided that no state shall

Note

deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. That corporations are persons within the meaning of this amendment is now settled. Santa Clara Co. *v.* Southern Pac. R. Co., 118 U. S. 394, 396, 24 Am. & Eng. R. Cas. 523, 6 Sup. Ct. 1132; Railroad Co. *v.* Gibbes, 142 U. S. 386, 391, 12 Sup. Ct. 255; Railway Co. *v.* Ellis, 165 U. S. 150, 154, 17 Sup. Ct. 255. What amounts to deprivation of property without due process of law, or what is a denial of the equal protection of the laws, is often difficult to determine, especially where the question relates to the property of a *quasi* public corporation, and the extent to which it may be subjected to public control. But this court, speaking by CHIEF JUSTICE WAITE, has said that, while the state has power to fix the charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by valid contract, or unless what is done amounts to a regulation of foreign or interstate commerce, such power is not without limit; and that, 'under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law.' Railroad Commission Cases, 116 U. S. 307, 325, 331, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191. This principle was recognized in Dow *v.* Beidelman, 125 U. S. 680, 689, 34 Am. & Eng. R. Cas. 322, 8 Sup. Ct. 1028, and has been reaffirmed in other cases. In Banking Co. *v.* Smith, 128 U. S. 174, 179, 35 Am. & Eng. R. Cas. 511, 9 Sup. Ct. 47, it was said that the power of the state to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits—in the absence of any provision in the charter of the company constituting a contract vesting it with authority over those matters—was 'subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce.' In Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S. 418, 458, 42 Am. & Eng. R. Cas. 285, 10 Sup. Ct. 462, 702, it was said: 'If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.' In

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Railway Co. *v.* Wellman, 143 U. S. 339, 344, 49 Am. & Eng. R. Cas. 1, 12 Sup. Ct. 400, the court, in answer to the suggestion that the legislature had no authority to prescribe maximum rates for railroad transportation, said that 'the legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates.' In Budd *v.* New York, 143 U. S. 517, 36 Am. & Eng. Corp. Cas. 31, 12 Sup. Ct. 468, the court, while sustaining the power of New York by statute to regulate charges to be exacted at grain elevators and warehouses in that state, took care to state, as a result of former decisions, that such power was not one 'to destroy or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law.'

In Reagan *v.* Trust Co., 154 U. S. 362, 399, 58 Am. & Eng. R. Cas. 699, 14 Sup. Ct. 1047, which involves the validity of certain rates for freights and passengers prescribed by a railroad commission established by an act of the legislature of Texas, this court, after referring to the above cases, said: 'These cases all support the proposition that, while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to devest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held. It was, therefore, within the competency of the circuit court of the United States for the Western district of Texas, at the instance of the plaintiff, a citizen of another state, to enter upon an

inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission.'

So, in Railway Co. *v.* Gill, 156 U. S. 649, 657, 15 Sup. Ct. 484 it was said that 'there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States, treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws.' In Road Co. *v.* Sanford, 164 U. S. 578, 584, 594, 595, 597, 17 Sup. Ct. 198, which involved the validity of a state enactment prescribing rates of toll on a turnpike road, the court said: 'A statute which, by its necessary operation compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair, and from earning any dividends whatever for stockholders, is as obnoxious to the constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight.' And in Chicago, B. & Q. R. Co. *v.* City of Chicago, 166 U. S. 226, 241, 17 Sup. Ct. 581, it was held that 'a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is upon principle and authority wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.' "

DUNN *et al.*

v.

COMMONWEALTH.

(*Court of Appeals of Kentucky, March 3, 1899.*)

Validity of Ordinance Restraining Prostitutes.*—Under the laws of Kentucky, a city of the fourth class has authority to pass an ordi-

*See note at end of case.

Dunn *et al. v.* Commonwealth

nance providing that prostitutes upon the streets between 7 o'clock p. m. and 4 o'clock a. m. without necessity, shall be liable to arrest, and be fined upon conviction.

Same--Constitutional Law.—The legislature in conferring such authority did not violate either the federal or state constitution.

APPEAL by defendant from Boyd county circuit court. *Affirmed.*

Dinkle & Montague, for appellants.

John A. Burns, for the Commonwealth.

PAYNTER, J. Section 3490, Ky. St., is part of the act for the government of cities of the fourth class, and as much of it as is pertinent to this inquiry reads as follows: "The board of council * * * shall have power within the city: (1) To pass ordinances not in conflict with the constitution or laws of this state or of the United States. * * * (14) * * * To restrain and punish vagrants, prostitutes, rakes and whoremongers." Conceiving it had the power, the board of council of the city of Catlettsburg passed an ordinance which reads as follows (section 24): "Any prostitute being upon the streets or alleys of the city of Catlettsburg, Kentucky, between the hours of seven o'clock p. m. and four o'clock a. m. following, standard time, except in instances of reasonable necessity, to be clearly shown by the party charged, shall be fined five dollars for each offense." The appellants are prostitutes, and went upon the streets between the hours of 7 o'clock p. m. and 4 o'clock a. m., without any reasonable necessity therefor. For this offense a warrant was issued for their arrest, and the trial resulted in their conviction, and a fine of five dollars was assessed against each of them. The circuit court sustained the action of the police judge imposing the fine. The question for review is whether the ordinance in question is valid.

Case Stated.

A municipality is but an agency of the state, and, whenever it passes an ordinance in the exercise of police power, it is in the instrumentality of the state, and does so for the state. The general assembly has vested the board of council of the

municipality of Catlettsburg with power to "restrain and punish prostitutes." The language used is broad and comprehensive enough to authorize the enactment of the ordinance under consideration. Did the general assembly have constitutional authority to vest the board of council with the power to enact the ordinance? Under our constitutional system, the ordinary police regulations have been left to the states. All that the federal government can do is to see that the states do not in attempting to exercise the police power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the constitution has vested in the national government, or deprive a citizen of rights guarantied to him by the federal constitution. It is difficult to define the police power of a state. In speaking of the police power of the states Mr. Cooley, in his work on Constitutional Limitations (page 704), says: "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks, not only to preserve the public order, and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." Blackstone defines it to be "the due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations." 4 Bl. Comm. 162. In speaking of the difficulty in defining the extent of police power, in Stone *v.* Mississippi, 101 U. S. 814, it was said: "Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within

the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate."

Courts and law writers have found it difficult to define the extent and boundaries of the police power. It certainly extends to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. Every citizen has the constitutional guaranty of life, liberty, and enjoyment of his property; and they cannot be taken from him, except by due process of law. Social and conventional rights, however, are subject to such reasonable limitations in their enjoyment as will prevent them from being dangerous and hurtful to the body politic; and the lawmaking department of the government, under the power vested in it by the constitution, can enact laws providing that for such reasonable restraints and regulations as may be necessary and expedient to secure social order and public morals. It is the duty of the state, direct or through such agencies as it may provide, to protect the public health and morals. It has the power by law to declare what shall constitute an offense, and provide a punishment for it within the constitutional limitations. It is certainly within the legislative power to provide for the restriction or suppression of bawdy houses. Our social institutions and public conscience demand that they shall be regulated or suppressed. The unfortunate beings who live in such houses, and pursue their occupation, live from their acts of immorality, which are a violation of social order, and tend to the destruction of public morals. The board of council of a municipality is presumably familiar with their habits and method in the prosecution of their work of shame and degradation. It was known to the board of council that these unfortunate women did nothing for a livelihood except to make merchandise of themselves. The favorite time of their business is between nightfall and the next day's dawn. Their conduct is calculated to bring together disorderly and ill-disposed persons, and likely to result in a breach of the

public peace. Therefore the lawmaking department of the municipality declared that they should keep off of the streets and alleys of the city during the hours in which they could more successfully prosecute their immoral work. We think this is a reasonable restraint, and it does not unreasonably abridge their personal liberty. By the terms of the ordinance, they are allowed to go upon the streets if there is a reasonable necessity for it. During the 15 hours of the 24, these habitual offenders against the moral, social, and penal laws are permitted to go wherever they please upon the streets and alleys of the city, which affords them ample opportunity for healthful exercise, and of attending to their reasonable wants.

Validity of Ordinance Restraining Prostitutes.

Mr. Cooley, in his work on Constitutional Limitations (page 745), says: "It is sufficient for us to have pointed out that, in addition to the power to punish misdemeanors and felonies, the state has also the authority to make extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property." It has been held by courts that, under the police power, municipalities can regulate the height of buildings in cities, prescribe the streets upon which persons driving a certain class of vehicles shall travel, and prohibit them from traveling upon other streets, and regulate the hours at which public places, places of amusement, and saloons shall be closed. The legislatures of the states can enact laws to regulate the employment of children of certain ages, and prohibit women from engaging in certain kinds of employment. It has been held by some courts that a penalty can be imposed upon livery stable keepers for giving credit to pupils without the consent of the college authorities. It has been held, to protect laborers against oppression of their employers, that it is competent to forbid them being paid anything except legal-tender funds. Many illustrations of the exercise of police

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power, which has been sustained by the courts of the country, could be given. These suggestions are merely to show the extent and comprehensiveness or the police power of the states, as interpreted by this and other courts of the country. Our attention has not been called to any case involving the exact question involved in this case. As cases arise in which the police power is attempted to be exercised, we must determine whether or not it has been constitutionally done.

Same—Constitutional Law.

Our conclusion is that the legislature had vested the board of council with the power to pass the ordinance, and that, in doing so, it did not violate the constitution of this state or that of the United States.

When the court had under consideration the case of Meader Furniture Co. *v.* City of Newport (Ky.) 30 S. W. 207, its attention was not called to section 3519, Ky. St., which expressly gives this court jurisdiction of appeals from the judgments of circuit courts where fines of twenty dollars or less are imposed under ordinances the validity of which is questioned. If the court's attention had been called to this section of the statute, it would not have taken the view of the question of the appellant's right to an appeal which it took. The judgment is affirmed.

NOTE.

Street-Walkers—Validity of Ordinance.—In Braddy *v.* Milledgeville, 74 Ga. 516, 58 Am. Rep. 443, it was held that a city may enforce an ordinance punishing street-walkers for loitering about the streets or stores at night, and in a prosecution evidence of a woman's general character is admissible.

SEAMONS *et ux.*

v.

FITTS, TOWN TREASURER.

(*Supreme Court of Rhode Island, March 22, 1899.*)

Excavations in Highways—Duty of Towns to Supervise.*—A town is bound to exercise supervision over the making of an excavation or obstruction which it permits in its highways, or over any, of which it has notice, made without its authority or permission.

Same—Knowledge of Officer—Personal Injuries—Liability of Town.—Knowledge of the making of an excavation in a highway of a town on the part of its highway surveyor is notice to the town; and where personal injuries result from his neglect to see that the excavation is properly refilled, the town is liable for such injuries.

Same—Refilling—Expert Evidence.—In an action for such injuries, it was proper to allow experts to testify against defendant's objection as to the proper way to fill up excavations in streets to prevent them from becoming soft and miry, the person who made the excavation having testified as to the manner in which he had refilled it.

Same—Injuries—Notice of Claim.*—In such highway accident cases a statute of Rhode Island requires that notice of the injury shall be given within a specified time by presenting it to the town council. *Held*, that service of the notice upon the town treasurer was not a compliance with the act.

Same—Same—Same.—Nor was service of the notice upon the individual members of the town council when separate and apart from one another a compliance with the statute.

Same—Same—Same.—But service of the notice upon the town clerk constituted a legal service under the statute, he having the custody of all papers coming before the town council, and being accessible at all times.

Excessive Verdict.—The plaintiff having been caused pain and suffering by the negligence of the town, and the jury, after hearing all the evidence, having fixed the amount of damages at $2,000, the verdict will not be disturbed as excessive.

Harmless Error.—Defendant was not prejudiced by the action of

*See notes at end of case.

Seamons *et ux.* *v.* Fitts, Town Treasurer

the court in reading to the jury a statute in regard to notice of such defects on the part of towns, although such statute was not in force when the accident occurred, it appearing from the evidence that the town had legal notice through its officer.

DEFENDANT'S petition for new trial. *Denied.*

Patrick J. McCarthy and *Edward De V. O'Connor*, for plaintiffs.

Samuel W. K. Allen, for defendant.

Case Stated.

ROGERS, J. This is an action on the case to recover damages for the alleged neglect of the town of East Greenwich to keep one of its highways in repair. It has already been before this division on the plaintiffs' petition for a new trial (20 R. I. —, 40 Atl. 3), and, a new trial having been granted, and the case having been tried again before a jury, wherein verdict was rendered for the plaintiffs in the sum of $2,000, it is now before us on the defendant's petition for a new trial, and this time upon the allegations that the verdict was against the evidence, that the justice at the jury trial admitted evidence against defendant's objection contrary to law, that the judge erred in charging the jury as to the law, and that the damages awarded were excessive. From the evidence it appeared that on May 12, 1895, the plaintiffs were driving in an express wagon along Main street, in the village of East Greenwich, during a hard rain-storm, and when at a point nearly opposite the town clerk's office the horse's forefeet sank into a soft place in the road for a considerable depth, throwing the horse down, and pitching the plaintiffs headlong onto the ground, causing injury to Mrs. Seamons, which is the subject of this suit. It appeared that some nine weeks before the accident an excavation in the street had been made for the purpose of lowering water pipe to prevent its freezing, and the plaintiffs claim that the excavation had been so negligently and improperly refilled that the earth in it had been softened by rains, so that, when plaintiffs' horse stepped on it on the day in question it would not bear him up; and thus the alleged injury was

caused. As the evidence was clear, and practically without contradiction that an excavation was made in the public highway at the spot where the accident took place; that the excavation so made was improperly filled up; that, as a consequence thereof, the heavy rains shortly before and at the time of the accident made the filling soft and dangerous, although for a while after the refilling it seemed firm; as the highway surveyor of that district himself swore that he knew there was something being done there, as he could see the dirt thrown up on the side; that he saw a lantern there one night; that he never examined to see what the cause of it was, nor who made the excavation, nor supervised the refilling it, nor examined to see that it was properly done,—the defendant's contention that the verdict was against the evidence in being for the plaintiffs, so far as the evidence relating to the accident itself goes, seems to us utterly untenable. As stated in this case when previously before the court, a town is bound to exercise supervision over the making of an excavation or obstruction which it authorizes or permits in its highways, or over any, of which it has notice, made without its authority or permission. Knowledge on the part of the highway surveyor is notice to the town. His neglect is to be regarded as the neglect of the town, and the town is liable for the damages which result. Seamons *v.* Fitts, 20 R. I.—, 40 Atl. 3.

Excavations in Highways—Duty of Towns to Supervise.

Same—Knowledge of Officer—Personal Injuries—Liability of Town.

The common pleas division permitted experts in drain-pipe laying, who had special knowledge and experience in filling excavations, to testify, against the defendant's objection, as to the proper way to fill up excavations in streets to prevent them from becoming soft and miry, in order to aid the jury to determine whether the excavation that caused the accident was properly refilled; the person who made the excavation having himself testified as to the way and manner in which he had filled the excavation in question. That was a matter calling

Same—Refilling—Expert Evidence.

for special knowledge, and, in our opinion, expert testimony was properly admissible. The statutes of the state require that highways within the bounds of any town shall be kept in repair, and amended from time to time, so that the same may be safe and convenient for travelers with their teams, carts, and carriages at all seasons of the year, at the proper charge and expense of such town, under the care and direction of the surveyor of highways of such town (Pub. St. R. I. c. 65, § 1); and any person receiving or suffering bodily injury through a defect or want of repair in or upon a public highway in any town which is by law obliged to repair the same might, upon certain conditions, recover damage for such bodily injury not exceeding $4,000. Pub. Laws R. I. 1892–93, c. 1194, §§ 1, 3. Sections 2 and 4 of said last-mentioned chapter are as follows:

"Sec. 2. A person so injured or damaged shall, within sixty days thereafter, give to the town by law obliged to keep such highway, causeway, or bridge in repair, notice of the time, place, and cause of such injury or damage, and if the said town shall not make just and due satisfaction therefor, within the time prescribed by section 12 of chapter 34 of the Public Statutes, he shall, within one year after the date of such injury or damage, commence his action against the town treasurer for the recovery of the same, and not thereafter."

"Sec. 4. The notice required by section 2 shall be in writing, signed by the person injured or damaged, or by some one in his behalf, and shall be presented to the town council of the town or the city council of the city; but if from physical or mental incapacity it is impossible for the person injured to give the notice within the time prescribed in said section, he may give the same within ten days after such incapacity is removed, and in case of his death without having given the notice and without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give such notice within thirty days after his appointment."

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The defendant contends that the plaintiffs did not conform to said sections 2 and 4 as to notice, and that the required notice has not been given. The evidence shows that the injury complained of was sustained on May 12, 1895, and that on July 3, 1895, a notice was severally served by the sheriff of Kent county upon the persons holding the offices of town treasurer and of town clerk, and upon four of the members of the town council, of East Greenwich, and upon July 5, 1895, upon the other, or fifth, member of said town council, and that the notices so served were all duplicate originals, signed by the plaintiffs. The notice began in this wise: "State of Rhode Island, Kent County, Town of East Greenwich. The Town of East Greenwich and the Honorable the Town Council of East Greenwich: You are hereby notified that the undersigned," etc., and then followed a description of the time, place, and cause of the injuries sustained, and many details in regard thereto, and the amount of damage claimed to have been sustained thereby. The evidence of the sheriff showed that the said notice was served on each of said officials at different places, and not upon the members of the town council or upon the town clerk when the town council was in session; that it was served upon the town clerk upon the street in East Greenwich, upon the town treasurer and upon Councilman Briggs in the town clerk's office in East Greenwich, upon Councilmen Andrews and Keelin at their places of business in said town, upon Councilman Church in Providence, and he cannot tell exactly where he did find Councilman Brown. There is no question raised, as we understand it, of the sufficiency of the notice, if properly served under the statute; and the question now before us as to notice is as to the sufficiency of the service. The testimony of George A. Loomis, who was, on July 3, 1895, town clerk of the town of East Greenwich, is that he was served by Sheriff Sprague with a notice in reference to the claim made in this suit, identifying the notice as the one put in on the trial of this case, and that he

Same—Injuries—Notice of Claim.

cannot fix the exact date; but in answer to direct question 15, "Is there any doubt in your mind that it was served on you at the time Mr. Sprague states?" his answer was, "There is not." The notice being in proper form, and July 3 or July 5, 1895, being within 60 days of the date of the accident, then the inquiry is narrowed to the question whether service upon either, any, or all of the persons served was a compliance with the statute. We think that serving the notice required under said chapter 1194, §§ 2, 4, upon the town treasurer, as done in this case, was utterly futile and ineffective. A town treasurer is not the town council, nor its representative in any way in the service of the statute notice. He represents the town by special statute provision so far as being the proper officer against whom to bring suit and to serve process of court upon in suing on a claim against the town; but, as to the preliminary notice to be presented to the town council, he is utterly without representative capacity under the statute. Great difference of opinion seems to exist in practice as to what is a compliance with the statute as to notice to the town council in highway accident cases. In some towns and cities the injured party always procures some member of the town or city council to present his claim to the council when in actual collective session, within the required time. That this is a compliance with the statute there can be no doubt; but the notice in this case was not so served, and the question therefore arises whether that is the only effectual manner under the statute of serving the required notice. The statute provides that the person injured shall, within 60 days thereafter, give the required notice, which means, of course, that the notice shall be given within 60 days of the occurrence of the injury or damage; and if from physical or mental incapacity it is impossible for the person injured to give the notice within said 60 days, then he may give the same within 10 days after such incapacity is removed. The statute provides that town councils in towns where the council has probate jurisdiction shall hold regular meetings for the transaction of

council and probate business as often as once in each month (Pub. St. R. I. c. 38, § 2), and the council can meet as much oftener as it sees fit to adjourn to from time to time. If a town council only holds sessions monthly, however,—as many of them, doubtless, do,—and an injury occurred a week before a meeting of the town council, the next meeting being a month thereafter, there would be only two meetings of the town council within 60 days after the happening of the injury, and the last of such meetings would take place within 40 days after the injury. In a sense, both meetings would thus be within 60 days after the accident, but clearly not within the sense intended by the statute, for that contemplates that the person injured shall have 60 days in which to give his notice; and, if there is no meeting of the town council on the last day of the 60 days, he does not have the full period allowed him by statute. And, even if a meeting of the town council was held on the last of the 60 days, it seems to us that the intent of the statute was not that he was to have a limited number of opportunities merely within a space of 60 days, but that at any reasonable time, being the first, tenth, or any other day within 60 days after the injury, the injured party should be entitled to present his claim to the town council, just as with filing papers in a case in court. But suppose he was physically or mentally incapacitated from giving the notice within 60 days, and such incapacity ceased to exist 2 days after the time of holding a town council meeting, and no other meeting was to be holden for a month, then the requirement of the statute that he give notice within 10 days after the removal of such incapacity would be utterly nugatory, and of no avail, which certainly could not have been within the intent of the statute.

The notice in this case, besides being served upon the town treasurer, was served upon or presented to the individual members of the town council when separate and apart from one another, and not in session as the town council, which involves the inquiry whether this constituted the presenting notice to the town

Same—Same—Same.

council required by the statute. The town council is a collective body, and, in the words of the statute, "a majority of the persons elected members of any town council shall be a quorum; and a majority of the members present at any legal meeting may determine any matter legally before them." Pub. St. R. I. c. 38, § 1. Technically speaking, then, the individual members of the town council, when separate and apart from one another, do not constitute the town council, but "a majority of the persons elected members of the town council present at any legal meeting" is necessary to constitute the town council; and the town council shall consist of not less than three nor more than seven members. *Id.* c. 37, § 1. The charter of the city of Providence (section 11, cl. 2) provides that "the mayor, aldermen, and common council, in their joint capacity, shall be styled the city council." There are 10 aldermen and 40 common councilmen; hence, including the mayor, service would have to be made upon 51 persons if an injury occurred in the city of Providence, if such a notice was requisite. This would entail an intolerable, if not a prohibitive, burden upon a claimant, for, apart from the labor and expenses involved, if it were possible, it would be oftentimes impossible to get a service within 60 days upon the whole 51, owing to the absence of some of them from the jurisdiction. We have not been able to discover that it was the imperative duty of any one of the council to be present at any given meeting, and to bring any claim served upon him to such meeting, and there present the same, although generally it would, of course, be the duty of members to attend council meetings as often as possible; and it is not of infrequent occurrence for individual members of the council to be absent from meetings. We do not believe that the statute contemplated service of the notice upon the separate and individual members in the manner the proof in this case shows it to have been done, and our opinion is that such service is of no effect.

As the only other way in which the notice was attempted

to be served in this case was upon the town clerk, the inquiry arises whether that constituted a legal service under the statute. Every town is required to have a town clerk, and to have a town clerk's office within the town, which officer, by statute, is required, within 30 days of the time of being sworn into office, to give bond to the town treasurer of the town, with sufficient surety, in such sum as the town council of such town shall prescribe, conditioned for the faithful performance of the duties of his office. Pub. St. R. I. c. 37, § 1; *Id.* c. 39, § 1. The duties of this officer are indicated in various sections of the statutes, too numerous to refer to in detail, especially in title 7 "Of Towns and Town Officers." *Id.* pp. 101–119; but his duties are sufficiently defined and summarized for our purpose in 2 Bouv. Law Dict. 1127, in this wise, *viz.*: "Town Clerk. A principal officer who keeps the records, issues calls for town meetings, and performs generally the duties of a secretary to the political organization." Here, then, is a sworn public town officer, under bond for the faithful performance of his duty, and whose duty it is to keep the records of the town council, and therefore the custody of all papers coming before it, who is accessible at all times, whether the town council is in actual session or not, and who, when it is in session, is to attend the meetings thereof, and record its doings, and to see that the papers in his hands for presentation to the council are there and presented to it. The town clerk, then, from the very nature of his duties, must be the officer or representative of the town council to receive papers intended for it, and to see that such papers are presented to it. The existence of such an officer would remove all apparent inconsistencies and incongruities in the statute, and would afford an opportunity to all claimants to avail themselves of all or any of the days allowed them in which to present their claims. In our opinion, the reason of the statute points unerringly to the town clerk as the one to whom, as the clerk of the town council, and the custodian of its papers, the claim for damages may be presented in order to conform with the statute

Same—Same—Same.

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requirement of presenting the claim to the town council, and that the notice in this case, being properly addressed to the town council (Whalen *v.* Bates, 19 R. I. 275, 33 Atl. 224; McKenna *v.* Bates, 19 R. I. 610, 36 Atl. 1133), and served on the town clerk within the time fixed by the statute, as shown in the case at bar to have been done, was a compliance with the statute requirement.

The objection that the damages given by the jury were excessive does not seem to us to be well founded. That Mrs. Seamons was caused pain and suffering by the negligence of the town of East Greenwich seems to us perfectly apparent from her own and her daughter's testimony; and the jury, after hearing all the testimony, having fixed the amount at $2,000, we do not find anything in the testimony to justify us in reducing it.

Excessive Verdict.

Some objection to the judge's charge was made by the defendant, owing to his having read to the jury some portions of Gen. Laws R. I. c. 72, as in force when the accident happened, whereas said chapter had not then been enacted. The portion so read, however, that was not in force by previous enactment, seems to us utterly inconsequential, as there was no claim by any one that the town council had notice of the defects complained of, but only that the surveyor of highways had such notice, and that notice to him was all-sufficient. That such notice was sufficient by law at the time of the negligence complained of seems to us to be beyond question. Jordan *v.* Peckham, 19 R. I. 28, 29, 31 Atl. 305.

Harmless Error.

We find nothing in any of the grounds advanced for a new trial to justify our granting one. The petition is therefore denied and dismissed, and the case is remitted to the common pleas division with direction to enter judgment for the plaintiff upon the verdict.

NOTES.

Defective Streets—Liability of Municipality.—See generally City of Circleville *v.* Sohn (Ohio), *ante*, p. 50, and *note*, p. 58.

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Same—Same—Acts of Others.—A municipality is liable for injuries resulting from defects in highways caused by the acts of others, if it failed to have proper repairs made after it was chargeable with notice of the defects. Saulsbury *v.* Ithaca, 94 N. Y. 27, 46 Am. Rep. 122; Hill *v.* Fond du Lac, 56 Wis. 242; Aurora *v.* Bitner, 100 Ind. 396; Peoria *v.* Simpson, 110 Ill. 294; Russell *v.* Canastota, 98 N. Y. 496; Dotton *v.* Albion 50 Mich. 129; Campbell *v.* Stillwater, 32 Minn. 308; Tierney *v.* Troy, 41 Hun (N. Y.) 120; Sides *v.* Portsmouth, 59 N. H. 24; Huntington *v.* Breen, 77 Ind. 29; Robbins *v.* Chicago, 4 Wall. (U. S.) 657; Griffin *v.* Mayor, etc., 9 N. Y. 456; Stirling *v.* Thomas, 60 Ill. 264; Russell *v.* Columbia, 74 Mo. 480, 41 Am. Rep. 325; In Stephens *v.* Macon, 83 Mo. 345; Indianapolis *v.* Doherty, 71 Ind. 5; Urquhart *v.* Ogdensburg, 97 N. Y. 238, 7 Am. & Eng. Corp. Cas. 25; Estelle *v.* Lake Crystal, 27 Minn. 243; Avery *v.* Syracuse, 29 Hun (N. Y.) 537.

Thus in Savannah *v.* Donnelly, 71 Ga. 258, it was *held*, where a municipal corporation gave express permission to an individual to open a ditch across a street in the city, in order to connect the water-pipes of a private person with the water-works belonging to the city, this was in effect the opening of the ditch by the city itself; it was the act of the city, and the latter became liable for any damage which might accrue to any person by reason of the careless and negligent manner in which the work was done. It was the duty of the city to have superintended and overlooked the work which it permitted to be done on its streets, and to have seen that it was done in such manner that no injury should come to passers on the street from defects therein.

Same—Same—Liability as Affected by Notice.—See generally, Village of Shelby *v.* Clagett (Ohio), 31 Am. & Eng. Corp. Cas. 66; Whitney *v.* City of Lowell (Mass.), 31 *Id.* 73, *note* 75; Chase *v.* City of Lowell (Mass.), 31 *Id.* 78; Whitfield *v.* City of Meridian (Miss.), 31 *Id.* 15; Bieling *v.* City of Brooklyn (N. Y.), 31 *Id.* 111; Malloy *v.* Township of Walker (Mich.), 31 *Id.* 27; District of Columbia *v.* Woodbury (U. S.), 31 *Id.* 96; Buck *v.* Biddeford (Me.), 31 *Id.* 42, *note*, 25 *Id.* 123; Dundas *v.* City of Lansing (Mich.), 25 *Id.* 239; Shaw *v.* President, etc., of Sun Prairie (Wis.), 25 *Id.* 225, *note* 230.

Not Liable Without Notice.—In City of Galveston *v.* Smith, (Tex., Feb. 27, 1891), 15 S. W. Rep 589, which was an action to recover damage for injuries sustained by plaintiff owing to a defective covering of a street culvert, the court refused, at defendant's request, to give the following instruction: "Notwithstanding the jury may believe from the evidence that the covering to the drain on which the plaintiff is alleged to have been injured had a loose plank thereon, and was, by reason thereof, defective, and that the injury to the plain-

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tiff was the result of such defect, yet these facts alone would not be sufficient evidence of negligence on the part of the defendant. In order to charge the defendant with negligence, it must appear from the evidence, not only that the said covering to the drain was defective at the time of the alleged injury, but also either that such defect was actually known to the defendant, through some of its officers or servants having charge of such matters, or that the defect had existed for such a length of time prior to the alleged injury that the city authorities, if exercising ordinary diligence, would or should have known of its existence." *Held*, error. The court said: "We think that the propositions contained in the requested charge are correct when applied to suits against municipal corporations for damages. This court said in the case of City of Galveston *v.* Barbour, 62 Tex. 176, 8 Am. & Eng. Corp. Cas. 577; 'In cases of this character, to render a municipal corporation liable, there should be evidence showing that it had notice of such defect as caused the injury; for it cannot be presumed that notice of every trifling defect exists.' 2 Dill. Mun. Corp. §§ 1024, 1025; City of Chicago *v.* McCarthy, 75 Ill. 602. The supreme court of Michigan in the case of Dewey *v.* City of Detroit, 15 Mich. 313, say: 'That minute daily inspection which is possible and necessary on a line of railroad, where a small break may endanger hundreds of lives, would be absurd and impracticable in relation to sidewalks. A city, responsible as it must be only for the neglect incumbent on its agents, cannot be distinguished in its liabilities from individuals who might be intrusted with the same kind of duties. In this case the commissioner may be fairly regarded as representing the corporation. If a defect is found which he ought to have known, and which he has failed to repair within such reasonable time after such knowledge may be presumed to have reached him as, under all the circumstances, was sufficient to provide for such repairing, then there is a good cause of action, but not otherwise.' In the case before us, the evidence of the plaintiff was that the culvert on which she was crossing the street was covered with three planks; that one of them was loose, and when she stepped on the end of it it tipped up, causing her to fall into a shallow drain. There is in the record no evidence tending to show how the plank became loosened, nor that it had been in that condition previous to the time of plaintiff's injury, and none to show that the city had notice of the defective condition of the culvert. 'The basis of the action against a municipal corporation is negligence. Notice to the corporation of the defect which caused the injury, or facts from which notice thereof may be reasonably inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it is essential to liability.' "

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Same—Sudden Softening of Earth in Road.—In an action to recover for personal injuries occasioned by an alleged defect in a highway which the defendant town was bound to keep in repair, it appeared in evidence that the defect consisted in a softening of the earth in the road, under the influence of a heavy storm, due to the digging of a trench for a water pipe about six months before the accident, and that the road had been used meanwhile without the earth softening or any danger or defect existing until within an hour of the accident; and there was no claim that the town had notice, or might by the exercise of reasonable care and diligence have had notice, of the actual softening of the earth. *Held*, that the plaintiff was not entitled to go to the jury. Stoddard *v.* Winchester, 154 Mass. 150.

Same—Acts of Others.—Where, in violation of the city ordinances, certain encroachments had been made on the street whereby plaintiff was injured, but it did not appear that either common council or any of its officers had notice of the existence of the nuisance, the city was *held* not liable. Griffin *v.* Mayor, etc., of New York, 9 N. Y. 456.

In an action against a city municipal corporation, to recover damages sustained in consequence of a grating over an area in a sidewalk being in a defective or unsafe condition, it is not enough to entitle the plaintiff to recover, to prove that the covering was insecurely fastened at the time of the accident, and that by reason thereof, and without fault on his part, he was injured. Notice to the defendant, or negligence of duty in not ascertaining and remedying it, must be shown. McGinity *v.* Mayor of New York, 5 Duer, 674.

A municipal corporation is not liable in damages to an individual for injuries caused by an opening in the sidewalk, made by an owner of the soil or the adjacent land, without proof of notice of the insufficiency or defect, and neglect to cause it to be remedied; nor are the public authorities presumed to have notice of a latent defect in the covering of an opening in the sidewalk, which was not made by them or under their direction; and notice to them of defects or obstructions in the streets, not occasioned by their own acts, must be express, or the defects must be so notorious as to be evident to all who have occasion to pass the place or to observe the premises. Hart *v.* Brooklyn, 36 Barb. 226.

In an action against a city for damages resulting from a defective sidewalk, it was *held* that a commissioner appointed under the charter to supervise the streets, subject to common council's direction, may in such matter be held to represent the corporation, and if a defect is found which he ought to have known, and which he has failed to repair within such reasonable time after such knowl-

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edge may be presumed to have reached him as, under the circumstances, was sufficient to provide for such repairing, then the city would be liable, but not otherwise. Dewey *v.* Detroit, 15 Mich. 307. See also Prindle *v.* Fletcher, 39 Vt. 257; Yale *v.* Turnpike Co., 18 Pick 357; Davis *v.* Plank Road Co., 27 Vt. 549, 1 Am. Rep. 202; Cooley *v.* Westbrook, 57 Me. 181, 2 Am. Rep. 30; Weisenberg *v.* Appleton, 36 Wis. 56, 7 Am. Rep. 39.

What Constitutes Notice.—As to what constitutes such notice of a defect or excavation in a highway as to render the municipality liable for an injury occasioned thereby, see the following cases: Manchester *v.* Hartford, 30 Conn. 118; Howe *v.* Lowell, 101 Mass. 99; Smith *v.* New York, 66 N. Y. 295; Furnell *v.* St. Paul, 20 Minn. 117; Nichols *v.* Alberis, 66 Mo. 413; Hubbard *v.* Concord, 35 N. H. 52; Ward *v.* Jefferson, 24 Wisc. 342; Danzeiser *v.* Cook, 40 Ind. 65; Weightman *v.* Washington, 1 Black, 39; Mersey Docks *v.* Gibbs, 11 H. L. Cas. 687; Castor *v.* Uxbridge, 39 App. Cas. Q. B. 113; Van Pelt *v.* Davenport, 42 Iowa 308; Boucher *v.* New Haven, 40 Conn. 456; Chicago *v.* McCarthy, 75 Ill. 602; Atlanta *v.* Perdue, 53 Ga. 607; Colley *v.* Westbrook, 57 Me. 181; Rice *v.* Des Moines, 40 Iowa, 638; Market *v.* St. Louis, 56 Mo. 189; Allbrittin *v.* Huntsville, 60 Ala. 486; How *v.* Plainfield, 41 N. H. 485; Perkins *v.* Fayette, 68 Mo. 152; Farrell *v.* Oldtown, 69 Me. 72; Kenady *v.* Lawrence, 128 Mass. 318; Lafayette *v.* Larson, 73 Ind. 367; Joliet *v.* Walker, 7 Ill. App. 267; Shell *v.* Appleton, 49 Wis. 125; Atlanta *v.* Champe, 66 Ga. 659; Huntingdon *v.* Breen, 77 Ind. 29; Smyth *v.* Bangor, 72 Me. 249; Salina *v.* Trosper, 27 Kans. 544; Logansport *v.* Justice, 74 Ind. 348; Chatsworth *v.* Ward, 10 Ill. App. 75; Benware *v.* Pine Valley, 53 Wis. 527.

Claim for Personal Injuries—Service of Notice.—In the New England towns the giving of a notice to the municipal authorities, specifying the character of the injury and the exact location of the accident, is an almost invariable condition precedent to the right to maintain an action for personal injuries. As to the time within which such notice must be sent and the requisites thereof, and the proper officials to whom the same should be transmitted, reference may be had to the following recent authorities: Smyth *v.* Bangor, 72 Me. 249; Wagner *v.* Camden, 73 Me. 485; Pratt *v.* Sherburne, 53 Vt. 370; Butts *v.* Stowe, 53 Vt. 600; Bliss *v.* Whittingham, 54 Vt. 172; Bartlett *v.* Cabot, 54 Vt. 242; Campbell *v.* Fairhaven, 54 Vt. 336; White *v.* Stowe, 54 Vt. 510; Donnelly *v.* Fall River, 130 Mass. 115; Noonan *v.* Lawrence, 130 Mass. 161; Taylor *v.* Woburn, 130 Mass. 474; Madden *v.* Springfield, 131 Mass. 141; Plum *v.* Fond du Lac, 51 Wis. 393; Teegarden *v.* Caledonia, 50 Wis. 292; Perry *v.* Putney, 52 Vt. 538; Maddox *v.* Randolph Co., 65 Ga. 216; Gay *v.* Cambridge, 128 Mass. 357; Miles *v.* Lynn, 130 Mass. 398.

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See, also, McCabe *v.* City of Cambridge, 134 Mass. 484 2 Am. & Eng. Corp. Cas. 557; McDougall *v.* City of Boston, 134 Mass. 149, 2 Am. & Eng. Corp. Cas. 561; Nichols *v.* Minneapolis, 2 Am. & Eng. Corp. Cas. 562.

MOORE

v.

TOWNSEND *et al.*

(*Supreme Court of Minnesota, April 21, 1899.*)

Public Nuisance—Negligence of Independent Contractor—Liabilities of Abutting Owner and Municipality.—By employing an independent contractor to paint a building the owners or occupants thereof cannot relieve themselves of a continuing duty which they owe to the public not to create or maintain a public nuisance on their premises; nor can the municipality in which such building is located be absolved from a like duty in respect to permitting a nuisance to be maintained, partly or wholly, in its streets.

Obstructing Sidewalk — Personal Injuries—Liability. — A long ladder, the lower end resting in a village street, outside the sidewalk, inclined over and across the walk, the upper end resting upon a building, was blown down in an unusual wind, and injured a passer-by. *Held*, that the negligence of the owner and occupants of the building in allowing the ladder to be inclined and to remain across the walk, and of the village authorities, after having knowledge of the facts, was the proximate cause of the injury; not the unusual wind.

Evidence.—*Held*, further, that the trial court erred when allowing counsel for plaintiff to propound a certain question to a witness, and also when it refused to strike out the answer.

(Syllabus by the Court.)

APPEAL by defendants from Mille Lacs county district court. *Affirmed.*

Chas. Keith, for appellants.

Giddings & Pratt, for respondent.

COLLINS, J. Action against the owner and occupants of a store building, and the village in which it was located, to

*See notes at end of case.

recover for injuries caused by the falling of a ladder upon plaintiff while he was walking upon a sidewalk.

Case Stated.

The ladder was about 40 feet long, made up by fastening three short ladders together, the lower end resting in the gutter outside of the walk, while the upper end was placed against the building. It was placed there some weeks before the accident, by a third party, who had contracted with the owner of the building to paint it on the outside, furnishing his own equipment and material. The contractor had finished his work 13 days, at least, prior to the day on which it was blown down by an unusual blast of wind, and proof of the defendants' knowledge of all of the facts was plenary. The verdict was for plaintiff.

1. All of the defendants join in the appeal from an order denying a motion for a new trial; and their counsel contends that no recovery can be sustained, because the ladder was placed in position by the painter, an independent contractor, for whose negligence defendants cannot be held liable. Without stopping to consider the availability of such a defense on behalf of the village, it is obvious that it is of no value to any of the defendants, on the facts now before us. The occupants and the owner of the building, without surrendering control over it, permitted the painter to create a nuisance in the public street when they allowed him to put the ladder in a position over the walk where it was a continual menace to all persons within its reach should it fall down. They, as well as the defendant village, maintained this nuisance for several weeks, and, as before stated, for at least 13 days after all necessity for use of the ladder had passed. By employing an independent contractor the owner or occupants of the building could not relieve themselves of the continuing duty which they owed to the public not to create or maintain a public nuisance on their premises. Nor could the village absolve itself of a like duty in respect to permitting a nuisance to be maintained, partly or wholly, in its streets. If a ladder placed over the sidewalk, as this was,

Public Nuisance—Negligence of Independent Contractor—Liabilities of Abutting Owner and Municipality.

could be allowed to endanger the life and limb of passers-by, the keeping open of a coal hole in a sidewalk could be defended on the same grounds. The question of defendants' negligence, under the circumstances here, was peculiarly for the jury. See Simpson *v.* Water Co., 62 Minn. 441, 64 N. W. 1144; Clark *v.* Lighting Co., 16 R. I. 463, 17 Atl. 59.

2. There is nothing in the claim that defendants were not guilty of negligence, because the ladder was blown down by an unusual wind. The negligence of the defendants, owner and occupants, in allowing the ladder to be inclined and to remain across the walk, and of the village, after its officers had knowledge of the fact, was the efficient cause of the injury to plaintiff. The fact that some other cause operated in connection with his negligence could not relieve defendants from liability. The original negligence concurred with another cause, and, operating at the same moment, produced the injury. The original negligent act of placing one end of the ladder in the public street, inclining it over the walk, and resting the upper end against the building, thus creating a public nuisance, was the proximate cause of the accident, and without this act plaintiff's injuries would not have been received.

Obstructing Sidewalk—Personal Injuries—Liability.

3. But a new trial must be ordered, because there was prejudicial error on the part of the court when ruling in respect to certain evidence offered by plaintiff's counsel. The village marshal was examined in reference to his knowledge of the ladder, and testified that, a short time prior to the accident, he spoke to defendant A. T. Townsend about it. The witness was then asked, "Why did you do that?" This was properly objected to by counsel for defendants, but the objection was overruled and an exception taken. Whereupon the witness answered, "It was a long, heavy ladder, and dangerous standing there, in my estimation; liable to blow down, I thought." A motion to strike out this answer as incompetent, irrelevant, immaterial, being an opinion of the witness, and not responsive,

Evidence.

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was denied; defendants excepting. It was error to permit such a question to be propounded, because, while it was proper to show the conversation between the witness and one of the defendants in respect to the ladder, the reasons which influenced the former were immaterial; and the trial court again erred when it refused to strike out an answer, irresponsive in part, and in which was the opinion of the witness as to the ladder being dangerous while standing against the building. Of course, this was not a case for the admission of expert testimony as to whether or not the ladder was heavy, or dangerous, or liable to blow down. Order reversed.

NOTES.

Liability of Municipality for Maintaining Nuisance.—See generally City of New Albany *v.* Slider, *ante* 157, and extensive *note*, 162 *et seq.*

Defective Streets—Liability of Municipality.—See generally City of Circleville *v.* Sohn, *ante* 50, and *note*, 58 *et seq.*

Same—Same—Acts of Others.—See Seamons *et ux. v.* Fitts, Town Treasurer, *ante*, and *note*.

Nuisances—Temporary Obstructions.—An obstruction of a street or sidewalk need not be of a permanent character in order to constitute a nuisance. Emerson *v.* Babcock, 66 Iowa 257, 55 Am. Rep. 273; Cohen *v.* Mayor, etc., of N. Y., 113 N. Y., 532, 25 Am. & Eng. Corp. Cas. 33, 10 Am. St. Rep. 506; Osage City *v.* Larkin, 40 Kan. 206, 10 Am. St. Rep. 186; Jochem *v.* Robinson, 66 Wis. 638, 57 Am. Rep. 298; Rex *v.* Russell, 6 East 427; Fritz *v.* Hobson, 42 L. T. 225; Palmer *v.* Silverthorn, 32 Pa. St. 65; Marine Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. Rep. 650, 43 Am. & Eng. R. Cas. 79; Com. *v.* Passmore, 1 S. & R. (Pa.) 219; Lavery *v.* Haunigan, 52 N. Y. Super. Ct. 463; Rex *v.* Cross, 3 Campb. 226; Turner *v.* Holtzman, 54 Md. 148, 39 Am. Rep. 361; Branahan *v.* Hotel Co., 39 Ohio St. 333, 2 Am. & Eng. Corp. Cas. 1, 48 Am. Rep. 457; State *v.* Edens, 85 N. Car. 522; Rauch *v.* Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747; Murray *v.* South Carolina R. Co., 10 Rich. (S. Car.) 227, 70 Am. Dec. 219; Brownell *v.* Troy, etc., R. Co., 55 Vt. 218, 15 Am. & Eng. R. Cas. 498; Gahagan *v.* Boston, etc., R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724; Vars *v.* Grand Trunk, etc., R. Co., 23 U. C. C. P. 143.

LYONS

v.

CITY OF RED WING.

(*Supreme Court of Minnesota, April 19, 1899.*)

Defective Sidewalk—Personal Injuries—Notice of Claim.—Precise and absolute certainty is not required in the description of the place where a party is injured in his notice to the council of a municipal corporation required by Gen. Laws 1897, c. 248. The notice is sufficient in this respect if the place of the accident is so described therein that the proper municipal officers may, by reasonable diligence, identify it. *Held*, that the notice in this case was sufficient.

Service of Notice.*—Method of serving such notice on the council indicated, and *held* that where, as in this case, the notice is presented to, and left with, the clerk having charge of the records and files of the council, at a meeting thereof, and is by him then presented and read to the council, the notice is properly served on, and presented to, the council.

Evidence.*—In an action for an injury caused by a particular defect in a side walk, evidence that the walk at or near the place was generally in bad condition is competent, as tending to prove notice to the city of the particular defect.

Same—Cross-Examination.*—The surgeon who attended the plaintiff's injuries testified that he made no particular record of the case. He did not give it as his opinion that the injuries were serious. *Held*, that it was not error to sustain an objection to the question on cross-examination whether he did not always keep a record of cases of a serious character.

Issues—Consent.—Rule that where parties have, by consent, tried an issue not made by the pleadings, they are bound by the result, followed.

Instructions.—Where an instruction to the jury is indefinite, the giving of it is not ground for exception. The remedy is to ask for a further and more specific instruction.

Knowledge of Danger—Degree of Care.*—The mere fact that a person knows that a sidewalk is in a defective and dangerous condition does not, as a matter of law, impose upon him the duty of abandoning the use of the street, or else use it at his peril. He is

*See note at end of case.

bound in such a case to use ordinary care, and no higher degree of care; that is, he is bound to use reasonable care, in view of all the circumstances of the case, including his previous knowledge of the condition of the walk.

(Syllabus by the Court.)

APPEAL by defendant from Goodhue county district court. *Affirmed.*

J. C. McClure, for appellant.

F. M. Wilson, for respondent.

START, C. J. Action to recover damages for a personal injury sustained by the plaintiff by a defective sidewalk of the defendant city. Verdict for the plaintiff for $90, and the defendant appealed from an order denying its motion for a new trial.

Case Stated.

1. The defendant's assignments of error 1, 2, 3, 4, 5, 6, and 11 may be considered together, as they relate to the sufficiency and service of the notice of the plaintiff's injury, and his claim for compensation therefor, as required by Gen. Laws 1897, c. 248. If the notice and claim were sufficient in substance, and were properly served or presented to the city council, all of the assignments of error now under consideration are without merit. That a notice in writing of the plaintiff's injuries, and his claim for compensation therefor, was presented to the city council within 30 days next after his injury, and considered by the council, is admitted. The only objection made to the notice is that it is too indefinite as to the description of the place where the injury was received. The object of the statute in requiring that the notice should state the place where the injury occurred is to furnish the municipal officers with such definite information as will enable them to intelligently investigate the facts as to the alleged injury. But precise and absolute certainty is not required. The notice is sufficient in this respect if the place of the accident is so described therein that the proper municipal officer may, by reasonable diligence, identify it. Harder *v.* City of Minneapolis, 40 Minn. 446, 42 N. W. 350; Elliott, Roads & S.

Defective Sidewalk—Personal Injuries—Notice of Claim.

475; Tuttle *v.* Town of Winchester, 50 Conn. 496; Spellman *v.* Inhabitants of Chicopee, 131 Mass. 443. The notice in question, after stating that the plaintiff was injured while walking along the sidewalk on the west side of Park street, in the city of Red Wing, and describing the cause, nature, and extent of the injury, concludes with these words: "That the place of my said accident was about seventy-three feet north of the fence on the north line of the property of John Woodcock, adjoining said South Park street." The notice is sufficient, for it identifies the place of the accident with substantial certainty. The defendant further claims that the notice and claim were not legally served on, or presented to, the city council. The statute requires that the injured party, as a condition precedent to the bringing of an action, shall, within 30 days after his injury, give notice thereof and present his claim for compensation to the city council or other governing body of the municipality. Gen. Laws 1897, c. 248; Bausher *v.* City of St. Paul (Minn.) 75 N. W. 745; Doyle *v.* City of Duluth (Minn.) 76 N. W. 1029. How the notice and claim shall be given and presented to such governing body the statute does not direct. There is, however, no practical difficulty in giving to the council the required notice. It must be done in an orderly and practical way. It would be unseemly to invade the council chamber, and interrupt the proceedings of the council, by attempting to serve the notice upon the members thereof or upon the presiding officer. It is sufficient if the notice and claim reach the council or governing body of the municipal corporation in due time, although it passes through the hands of others. Elliott, Roads & S. 476. If the council is not in session when the notice is served, it may be directed to the council, and left with the clerk or other officer who has charge of the records and files of the council, with a request annexed that it be laid before the council at its next meeting. This, or some similar method, is the only practical way of serving the notice on the council in cases where it is not in session during the 30 days within which the

Service of Notice.

notice must be given. If the notice is to be presented to the council when it is in session, the orderly course of procedure is to deliver it to the clerk or other officer having charge of the records of the council for its consideration. In this case the evidence tends to show that the plaintiff delivered the notice to the clerk for the council at a meeting thereof, and that the clerk presented and read it to the council, and the matter was referred to the committee on claims. Such was the undisputed evidence, except the recollection of the clerk was that the notice was given to him prior to the meeting of the council. The discrepancy is immaterial.

2. The plaintiff testified that where the accident happened the sidewalk was in a defective condition. He was then asked this question: "What was the condition of the walks along this place,—along this South Park street?" The question was objected to, and objection overruled. The ruling is the basis of the sixth assignment of error. The evidence sought to be elicited by the question was competent and material, as tending to show notice on the part of the city of the particular defect causing the injury. Gude *v.* City of Mankato, 30 Minn. 256, 15 N. W. 175; Kellogg *v.* Village of Janesville, 34 Minn. 132, 24 N. W. 359. The specific objection now urged to the question is that it included the walks on both sides of the street. A reading of the question, in connection with the testimony of the plaintiff which immediately preceded the question, answers the objection. The question related to the condition of the walk "along this place"; that is, in the vicinity of the accident.

Evidence.

3. The surgeon who attended to to the plaintiff's injuries testified that he made no particular note or record of the case, and was asked, on cross-examination, if he did not always keep a record of what he did in cases of a serious character. An objection to the question was sustained, and the ruling is assigned as the seventh error. It was correct, for the witness had not expressed any opinion to the effect that the plaintiff's injuries

Same—Cross-Examination.

were of a serious character, and the amount of the verdict indicates that the jury did not so regard them.

4. The trial court denied the defendant's motion to dismiss the action, and also its request to instruct the jury to return a verdict for the defendant. The correctness of these rulings is raised by the eighth and thirteenth assignments of error. Two reasons only are urged in support of the assignments. The first is that the evidence did not show that the notice and claim required by the statute have been given and presented to the council. We have already disposed of this objection. The second objection is that the plaintiff's alleged contributory negligence is admitted by a failure to reply. The complaint alleged that the plaintiff was carefully passing along the sidewalk in question, and was injured by the defect therein. The answer alleges that, if the plaintiff was injured, it was occasioned by his negligence in using, and walking along and upon, the sidewalk. Both of these allegations cannot be in fact true, and it would seem that the question of the plaintiff's contributory negligence was in issue without a reply. However this may be, it was so treated on the trial, and the parties voluntarily litigated the question without objection, and at the close of the evidence the defendant presented special requests for instructions to the jury on the issue. The case falls within the rule that where parties have, by consent, tried issues not made by the pleadings, they are bound by the result. Erickson *v.* Fisher, 51 Minn. 300, 53 N. W. 638; Bassett *v.* Haren, 61 Minn. 346, 63 N. W. 713.

Issues—Consent.

5. The remaining assignments of error relate to the charge of the court and its refusal of certain of the defendant's special requests. The trial court instructed the jury to the effect that cities are not insurers of the safety of their streets but that it was their duty to use reasonable care and diligence to keep them in a safe condition, and then said: "If they did that, they performed their whole duty; if they omitted to do it, they are guilty of negligence, and would be responsible for all damages— the injuries—

Instructions.

that *occurred by reason of that negligence.*" The defendant excepted to that portion of the charge which is in italics. The defendant claims that the court, by the clause excepted to, excluded from the consideration of the jury the question of the contributory negligence of the plaintiff. The instruction seems to have been an abstract proposition, and the objectionable clause used as a limitation of the extent of the damage. But if it be conceded that the instruction was indefinite, and liable to mislead the jury, for the reason suggested by counsel, still it was not ground for exception; for, if such were the case, the attention of the trial court should have been called to the specific objection, and an instruction asked as to the effect of the plaintiff's contributory negligence. Evans *v.* Railroad Co., 30 Minn. 489, 16 N. W. 271; Holm *v.* Sandberg, 32 Minn. 427, 21 N. W. 416; Clapp *v.* Railway Co., 36 Minn. 6, 29 N. W. 340. The defendant requested the court to instruct the jury: "First. If the jury find that the plaintiff, at the time of the alleged accident, knew that the sidewalk, at the place of the accident, was in a dangerous and defective condition, and voluntarily walked along it, when he could have easily avoided doing so, he took the chances of injury; and, if any injury happened to him on account of such dangerous and defective condition of the walk, he cannot recover damages therefor from the defendant. Second. If the plaintiff knew that the sidewalk was in a defective or dangerous condition, it was his duty, in passing over it, to use more than ordinary care and caution to avoid injury; and, if he failed to do so, he was guilty of contributory negligence, and he cannot recover damages for any injury he may have sustained by reason of such defective walk." The refusal of the court to give these requests is assigned as error. Neither of the requests was an accurate statement of the law, and both were correctly refused. The mere fact that the plaintiff knew that the walk was in a defective and dangerous condition did not, as a matter of law, impose upon him the duty of abandoning the use of the street, or else use it at his

Knowledge of Danger—Degree of Care.

peril, unless his act in so doing was not reasonably prudent. Jones, Neg. Mun. Corp. § 221; Kelly *v.* Railway Co., 28 Minn. 98, 9 N. W. 588; McKenzie *v.* City of Northfield, 30 Minn. 456, 16 N. W. 264. The second request imposed a higher degree of care upon the plaintiff than the law required of him; that is, more than ordinary care. He was bound to exercise only ordinary care; that is, reasonable care, in view of all the circumstances of the case, including his previous knowledge of the condition of the sidewalk; for the term "ordinary" or "reasonable" care is relative. What would be ordinary care in one case might be negligence in another. We discover no errors in the record. Order affirmed.

NOTES.

Personal Injuries—Notice of Claim.—See generally Seamons *et ux. v.* Fitts, Town Treasurer, *ante*, and *note*.

Evidence of Similar Disconnected Acts of Negligence.—Evidence of similar disconnected acts of negligence on the part of defendant is admissible where it appears that it was defendant's duty to have knowledge of them, and they would have put him on his guard against the danger of such accidents as the one experienced by plaintiff. Cleveland R. Co. *v.* Wynant, 114 Ind. 525, 35 Am. & Eng. R. Cas 328; St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 57 Am. Rep. 176, *note*, 28 Am. & Eng. R. Cas. 341, *ante*; Hoyt *v.* Jeffers, 30 Mich. 181; Hinds *v.* Barton, 25 N. Y. 544; Randall *v.* Northwestern Tel. Co., 54 Wis. 140. Thus, in an action against a railway company for an injury caused by the car running off the track, evidence is admissible to show that the same line of cars ran off the track on the same road; since such runnings off ought to have advised defendant of the bad condition of the track. Mobile R. Co. *v.* Ashcraft, 48 Ala. 15, Texas, etc., R. Co. *v.* Suggs, 62 Tex. 323, 21 Am. & Eng. R. Cas. 475. See also Simson *v.* London, etc., Co., L. R., 8 C. P. 390.

Personal Injuries—Defective Sidewalk—Evidence of Defective Condition at Other Places.—In an action against a city to recover damages for injuries sustained by tripping upon a loose board in a sidewalk, evidence is admissible to show that the walk was defective for the entire length of the block, as bearing upon the defendant's knowledge of the sidewalk's condition where the accident happened. McConnell *v.* City of Osage, Iowa Sup. Ct., May 27, 1890.

Notes

But in Michigan it was held to be error to permit the plaintiff to show the bad and defective condition of the walk at other places beyond the defect which caused the injury. Tice *v.* Bay City, 78 Mich. 209, citing Dundas *v.* Lansing, 75 Mich. 499. Although if the other defects are of long standing, and are in close proximity to the one which caused the accident, it appears that evidence is admissible as to them, as tending to show notice to the authorities. O'Neil *v.* Village of West Branch, Mich. Sup. Ct., June 27, 1890.

Using Street or Sidewalk with Knowledge of Defect.—Mere knowledge of a defect in a street or sidewalk by a person injured thereby is not necessarily a bar to recovery, where the defect is not of such a nature as to render the use of the street necessarily dangerous to a person ordinarily careful. Maus *v.* City of Springfield, 101 Mo. 613; Argus *v.* Village of Sturgis, 86 Mich. 344; Town of Poseyville *v.* Lewis, 126 Ind. 80. Thus the fact that a traveler walks upon a sidewalk, which he knows to be defective, does not bar him from recovering for personal injuries caused by such defect, if he has exercised ordinary care, but his knowledge as to the condition of the walk is one of the circumstances to be considered by the jury in determining whether there has been the exercise of ordinary care. City of Flora *v.* Naney (Ill., Jan. 24, 1891), 26 N. E. Rep. 645; Town of Poseyville *v.* Lewis, 126 Ind. 80.

Same—Illustrations.—A, going home from church in a city on a dark night, took the most direct route, which was an unlighted street, the sidewalk of which was generally used by the public, but was to A's knowledge in bad condition. While passing over an unsafe part, he fell and was injured; he might have taken the centre of the street, which was muddy; but if he had, he would have run the risk of falling into chuck-holes; or he might have gone around the block, but then he would have been required to have passed off the sidewalk, and might have encountered obstacles. *Held*, in an action against the municipality for damages, that if A voluntarily took the direct route, even though he knew it was unsafe, instead of one indirect and unsafe, and if he acted with the care with which a prudent man would have acted under the circumstances, he was not guilty of contributory negligence. City of Altoona *v.* Lotz (Pa.), 7 Atlantic Rep. 240.

In an action against a city for injuries sustained from falling into an excavation made for a sewer, it appearing that the excavation, which had been made that day, extended across a sidewalk, and was left open at night, without lights or guard, and that plaintiff should have known of its existence from having stepped across it on the sidewalk on the opposite side of the street, plaintiff could not be said, as a matter of law, to have been guilty of contributory negli-

gence; that being a question of fact for the jury. Mayor and Aldermen of Birmingham *v.* McCary, 84 Ala. 469.

As plaintiff was driving on a dark night along a highway of which the traveled part was only 14 feet wide, he kept to the right in order to avoid a deep mud hole, which covered more than half of the traveled part of the way. The wagon went off the traveled part of the way and was upset by a ditch or rock within the limits of the way. *Held*, in an action against the town for damages, that it was proper to submit the case to the jury, although it appeared that the plaintiff knew that the road was dangerous before he started. Pomeroy *v.* Inhabitants of Westfield (Mass., Oct. 24, 1891), 28 N. E. Rep. 899.

In McCue *v.* Borough of Knoxville (Pa., Jan. 4, 1892), 23 Atl. Rep. 439, plaintiff was a private watchman, and, in going to the performance of his duties on a dark night, fell into a hole in the sidewalk, sustaining the injuries complained of. He was aware of this defect in the walk, and on former occasions had stepped off before coming to it, but he did not do so on the occasion in question because, as he testified, he was mistaken as to his position on the walk. There was another route which he might have taken, but he testified that the one he did take was the nearest and best. *Held*, that the case should not have been withdrawn from the jury at its request.

GABLE

v.

CITY OF KANSAS CITY.

(*Supreme Court of Missouri, March 7, 1899.*)

Personal Injuries — Defective Sidewalk—Evidence of Similar Accidents.*—In an action for injuries alleged to have resulted from a defective sidewalk, evidence of similar accidents to another person at the place where it is alleged the injuries were sustained is not admissible.

APPEAL by plaintiff from Jackson county circuit court. *Affirmed.*

Geo. W. Day, for appellant.

Herbert S. Hadley, for respondent.

ROBINSON, J. By this action plaintiff sought to recover damages for personal injuries alleged to have been sustained

*See notes at end of case.

Gable *v.* City of Kansas City

by her in consequence of the defective condition of a board sidewalk on one of the streets of Kansas City, Mo. Plaintiff's claim is that on the 12th day of June, 1894, while walking on the sidewalk on the west side of Flora avenue, in Kansas city, between Eleventh and Twelfth streets, she stepped into a hole in the sidewalk, fell, and was seriously injured; the hole being concealed, or partly concealed, from view by a growth of weeds and other vegetation. The answer was a general denial, coupled with a plea of contributory negligence. There was a trial in the circuit court, which resulted in a verdict for the defendant, and the plaintiff, after the usual preliminaries has appealed.

The testimony on the merits is neither preserved in the bill of exceptions nor abstracted in this record. The record simply shows that plaintiff offered testimony tending to support the allegations of her petition, and that defendant offered testimony tending to support the allegations of its answer; and that, of the witnesses called by the plaintiff, one Ritta Hayes, after stating that she was acquainted with the condition of the sidewalk in June, 1894, at the place where plaintiff was injured, and that it was in a bad condition, and that she believed a little of it was broken off at each corner, and that she frequently used the walk in going to and from her home to different parts of the city, was asked the following question: "Did you ever fall or go through the walk at that point?" This question, on the objection of defendant, was excluded by the trial court, and the plaintiff excepted; the court saying, at the time of sustaining the objection, "The witness may state the condition of the sidewalk." The only question presented by the record for review now is the ruling of the circuit court in excluding the testimony of the witness Hayes on this one point. Whether evidence of similar accidents, by another, upon an alleged defective walk at the place where the injury complained of is charged to have occurred, within a reasonable time before or after the accident, is admissible, is a question that has given rise to numerous and conflicting opinions in the

different courts of our country. In point of number, as well as in the strength of reason upon which the two adverse rules have been announced, however, we think the weight of authority favors the rule denying the admission of such testimony as evidence. The question in issue, and to be determined by the jury, was the condition of the sidewalk on the 12th of June, 1894, when plaintiff was said to have been injured; and, if found to be defective, did such defect cause the injury to plaintiff while walking upon and using the same with proper and reasonable care? It is a condition and a fact the jury must find and determine upon, and not the experience or experiments of another or others. To permit such testimony to be heard would be to open the door to perplexing side issues, not raised by the pleadings, and which presumably neither party would be prepared to try,—a contingency which all rules of evidence should, as far as possible, be so framed as to avoid. In our judgment, all evidence of such collateral facts should be excluded, on the ground that it tends to draw the minds of the jurors from the real question in issue; to prejudice and mislead, rather than to inform them upon the direct issue that they must consider and pass upon; and, further, because the adverse party, having no notice from the pleading of such issue or issues, is not presumed to be prepared to meet it or them, when thus raised or developed, by the rule permitting the giving of such testimony. If the testimony of Mrs. Hayes would have been to the effect that she had fallen or gone through the sidewalk at the point where plaintiff claims she was injured, and is to be held and treated as tending to prove the defective condition of the sidewalk, as charged in plaintiff's petition (and that is the only object, plaintiff says, it was offered for), it must of necessity follow that the city would, for a like reason, have the right to show that, at the time the witness fell through the walk, she was not in the exercise of reasonable or ordinary care, and also that others had passed over the sidewalk in perfect safety, notwithstanding the alleged defect; and thus to the consideration of

the jury would be introduced an issue or issues as difficult of solution as the one they primarily were called to pass upon, as indicated by the pleadings. Under this rule, with each new witness thus called there would appear to view a new issue, and facts collateral thereto, not made by the pleadings, would be multiplied and increased until, in the chaos of complications, the real issue would be obscured and hidden, rather than elucidated and brought clearly to view,—the real purpose in calling witnesses. In the consideration of the question whether plaintiff's witnesses A., B., and C. were injured through a defect in the sidewalk, on account of their own fault or carelessness, the real issue must be lost sight of to some extent; and surely so when we permit the other question to be introduced as to whether the witnesses D., E., and F., called by defendant, passed over the sidewalk by the exercise of particular care to avoid the defect, or whether they passed over it in the ordinary course of travel; and no good can come from the recitation of the various and different experiences of so many different travelers upon the sidewalk, in the performance of the same act. We do not think there was error in the action of the trial court sustaining the objection to the testimony thus offered by plaintiff. After a witness has been called, and permitted to tell all he or she knows regarding the condition of the walk at the time and place of the accident, or shortly before or thereafter, as the case might be, all has been told by that witness of the facts in the case; and what has happened, or not happened, to him or her in dealing with those facts, is mere individual or personal experience, which a witness should only be permitted to give to the jurors when called as an expert upon some question that he or she is pronounced to be more familiar with than the average witness or juror. Certainly, a party who has fallen once or oftener upon a sidewalk at a designated place cannot be said to possess a special or peculiar knowledge over his more cautious, observing, or fortunate neighbor, who has never as much as stumbled in passing the same place, that entitles him or her to give his experience at that

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place as a stumbler, for the purpose of aiding the jurors in determining the real condition of the walk, or the question as to the care that plaintiff was exercising at the time she was injured. The question as to what is, or what is not, a defective sidewalk, is not one calling for expert testimony, but is one the jury must determine from the facts and conditions detailed to them by the witnesses. With the condition of the sidewalk, detailed by the witnesses to the jurors, they, as well as the greatest sidewalk builder or the most frequent sidewalk stumbler, are prepared to form their opinion as to the character of the walk, wholly unaided by the personal experience of another. The judgment of the circuit court is affirmed.

BRACE, P. J., and VALLIANT, J., concur. MARSHALL, J., absent.

NOTES.

Actions for Personal Injuries—Admissibility of Evidence of Similar Accidents at Same Place.—As to the admissibility of evidence of similar accidents to other persons at the same place, in action for personal injuries claimed to have resulted from negligence, the authorities do not seem to be in harmony. Some of them uphold the doctrine that such testimony is testimony as to a collateral fact which furnished no legal presumption as to the principal facts in dispute. Collins *v.* Inhabitants of Dorchester, 6 Cush. (Mass.) 397; Aldrich *v.* Inhabitants of Pelham, 1 Gray (Mass.) 510; Sherman *v.* Kortright, 52 Barb. (N. Y.) 267; Hubbard *v.* Concord, 35 N. H. 52, 69 Am. Dec. 520, *note*; Standish *v.* Washburn, 21 Pick. (Mass.) 237; Kidder *v.* Inhabitants of Dunstable, 11 Gray (Mass.) 342; Piollet *v.* Simmers, 106 Pa. St. 95, 51 Am. Rep. 496; Johnson *v.* Manhattan R. Co., 52 Hun (N. Y.) 111.

Contra.—In other cases such evidence has been held admissible. Wooley *v.* Grand Street, etc., R. Co., 83 N. Y. 121, 3 Am. & Eng. R. Cas. 398; Phelps *v.* Winona, etc., R. Co., 37 Minn. 485, 32 Am. & Eng. R. Cas. 56; Higley *v.* Gilmer, 3 Mont. 90. And such evidence was admitted in the following cases: Lewis *v.* Eastern R. Co., 60 N. H. 187; Crocker *v.* McGregor, 76 Me. 282; Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; Kent *v.* Lincoln, 32 Vt. 591; Quinlan *v.* Utica, 11 Hun (N. Y.) 217; affirmed, 74 N. Y. 603 (to show that sidewalk tested by actual use was in unsafe condition since several other people fell on it before plaintiff); District of Columbia *v.* Armes, 107 U. S. 519 (Same as case immediately preceding);

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Chicago *v.* Powers, 42 Ill. 169; Augusta *v.* Hafers, 61 Ga. 48, 34 Am. Rep. 95; House *v.* Metcalf, 27 Conn. 631; Calkins *v.* Hartford, 33 Conn. 57; Hill *v.* Portland, etc., R. Co., 55 Me. 439; Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98; Pittsburgh R. Co. *v.* Ruby 38 Ind. 294; Clapp *v.* Minneapolis, etc., R, Co., 36 Minn. 6; Cleveland R. Co. *v.* Wynant, 114 Ind. 525, 35 Am. & Eng. R. Cas. 328; St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 57 Am. Rep. 176, *note*, 28 Am. & Eng. R. Cas. 341; Hoyt *v.* Jeffers, 30 Mich. 181; Hinds *v.* Barton, 25 N. Y. 544; Randall *v.* Northwestern Tel. Co., 54 Wis. 140. Thus, in an action against a railway company for an injury caused by the car running off the track, evidence is admissible to show that the same line of cars ran off the track on the same road; since such runnings off ought to have advised defendant of the bad condition of the track. Mobile R. Co. *v.* Ashcraft, 48 Ala. 15; Texas, etc., R. Co. *v.* Suggs, 62 Tex. 323, 21 Am. & Eng. R. Cas. 475. See also Simson *v.* London, etc., Co. L. R., 8 C. P. 390.

Indiana.—In Cleveland, etc., R. Co. *v.* Wynant, 114 Ind. 525, 35 Am. & Eng. R. Cas. 328, it was held that where it is necessary to affect those charged with the duty of keeping highways, bridges or other structures in a safe condition, or of keeping only competent persons in their service, with notice of defects or unfitness, or where the question is as to the safety or availability of a machine or contrivance designed for a particular purpose, or for practical use, evidence is admissible to show how the thing served when put to the use for which it was designed, in the one case, or that occurrences of a character to make the defects or incompetency notorious had taken place in the other. The cases above are all cited as sustaining the doctrine as laid down. But in other cases (it is said in the same case, *i. e.*, Cleveland R. Co. *v.* Wynant) the rule is different. Evidence of other similar occurrences on other occasions is not admissible for the purpose of raising a presumption that the particular accident in question happened, or that the place was defective or dangerous, or that the situation was of such a character that the occurrences resulting in the injury complained of might well have taken place. The facts are the only legitimate evidence of the injury and of the manner and cause of the occurrence. *Citing* to support this, Ramsey *v.* Rushville Road Co., 81 Ind. 394; Maguire *v.* Middlesex R. Co., 115 Mass. 239; Hawks *v.* Charlemont, 110 Mass. 110.

For other Indiana decisions on this question see Pittsburgh, etc., R. Co. *v.* Ruby, 38 Ind. 294; Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264; Delphi *v.* Lowery, 74 Ind. 520; Fort Wayne *v.* Coombs, 107 Ind. 75; Louisville, etc., R. Co. *v.* Wright, 115 Ind. 378, 33 Am. & Eng. R. Cas. 370.

SEARS

v.

BOARD OF ALDERMEN OF CITY OF BOSTON *et al.*

(*Supreme Judicial Court of Massachusetts, March 3, 1899.*)

Watering Streets—Assessing Abutting Property—Constitutional Law.*—The benefit to abutting property from the watering of the street in front of it is such an improvement of the property that it can be made the subject of an assessment upon the property, provided that such an assessment does not substantially exceed the value of the special benefit.

Same — Constitutionality of Statute.— Under St. 1897 of Massachusetts, c. 419, cities are authorized to water some of their streets at the public expense, and to assess benefits for the watering of others upon abutters, as they may deem best. And the statute requires that such assessments shall be "in proportion to the number of linear feet of each estate upon the street or portion thereof so watered." *Held*, that as no facts appeared to show that such mode of assessment was not proper in its application to the petitioner's estates, the statute must be declared constitutional.

Validity of Assessment.—In assessing petitioner's estates, the proceedings were somewhat informal, but not fatally defective.

CERTIORARI. Petition dismissed.

C. F. Choate, Jr., for petitioner.

T. M. Babson, for defendants.

KNOWLTON, J. This is a petition for a writ of *certiorari* to quash alleged illegal assessments laid to meet the cost of watering streets in the city of Boston, under St. 1897, c. 419. The first and most important question in the case is whether this statute is constitutional. The right of the legislature to raise money by taxation is founded upon article 4, § 1, c. 1, of the constitution of the commonwealth. Under this article there is authority "to impose and

Case Stated.

*See note at end of case.

levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities," etc. This authority we need not consider in the present case. Secondly, there is authority "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident and estates lying within, said commonwealth." The watering of streets in thickly-settled portions of cities is such a public benefit that it legitimately may be provided for at the public expense. So far as it promotes the comfort, convenience, and prosperity of the people generally, as distinguished from landowners, it should be provided for by general taxation, which involves the assessment of proportional and reasonable taxes upon all persons and property within the city. The statute purports to authorize every city not only to "appropriate money for watering the public ways, or portions thereof, within its limits, at the expense, in whole or in part, of the city," but also to "determine that certain other public ways or portions thereof shall be watered at the expense in whole or in part of the abutters thereon." St. 1897, c. 419, § 1. This last provision calls for another kind of taxation, which is local and special. Such taxation, under the constitution, can only exist when there is a special or peculiar benefit to certain real estate, different from that which is received by the inhabitants generally. The owners of the land upon which such an assessment is made must pay the same share of the general taxes in proportion to the value of their property that other persons pay. As the constitution requires that taxes shall be proportional and reasonable, this additional special tax can be justified only when there is a special benefit to property from the expenditure on account of which the assessment is made. Wright *v.* City of Boston, 9 Cush. 233, 234; Proprietors of Mt. Auburn Cemetery *v.* City of Cambridge, 150 Mass. 12–14, 22 N. E. 66; Dorgan *v.* City of Boston, 12 Allen, 233–237; City of Boston *v.* Boston & A. R. Co., 170 Mass. 95, 49 N. E. 95; Town of Norwood *v.* New York & N. E. R. Co., 161 Mass. 259–264, 37 N. E. 199; Village of Nor-

wood *v.* Baker, 19 Sup. Ct. 187; Stuart *v.* Palmer, 74 N. Y. 189; Sharpe *v.* Speir, 4 Hill, 82; Hammett *v.* Philadelphia, 65 Pa. St. 146–157; Tide-Water Co. *v.* Coster, 18 N. J. Eq. 527; City of Norfolk *v.* Chamberlain, 89 Va. 196–213, 16 S. E. 730; Nichols *v.* Bridgeport, 23 Conn. 189; Thomas *v.* Gain, 35 Mich. 162; Taylor *v.* Palmer, 31 Cal. 254; Sheehan *v.* Hospital, 50 Mo. 155. In the last analysis, the assessment is not laid as a part of the burden of public expenditure put upon the land; for the burdens which are strictly public are to be shared proportionally by all the people, according to the value of their taxable property. It is rather in the nature of a diminution of that which at first is a public burden, by subtracting from it the amount of the special enhancement of value of private property from the expenditure of public money in part for its benefit. It is taxation in the sense that it is a distribution of that which is originally a public burden, growing out of an expenditure primarily for a public purpose.

It is a grave question whether the benefit that comes to abutting property from the watering of the street in front of it is such an improvement to the property that it can be made the subject of an assessment upon it. There must be a real substantial enhancement of value growing out of a public work to warrant an assessment of special taxes upon particular estates on account of it. The watering of streets produces only transitory effects, and makes no permanent change in the condition of the property. It greatly promotes the health and comfort of the people generally, who use the streets from time to time, but its greatest benefit is to the abutting estates as places for residence or the transaction of business. Indeed, so much more important to the occupants than to the general public have been the benefits from watering streets that until lately the expense of the work in this commonwealth has usually been borne by the abutters, who have procured the watering to be done by private contractors. If a special benefit, accruing from day to day, which very materially increases the rental value of real estate

by reason of the proximity of the property to the place where the beneficial work is done, can be treated as an improvement within the reason of the rule which permits special assessments, then such assessments may be made to pay the expense of watering streets. With some hesitation, we hold that there is an improvement of private property when this work is done by a city, which may warrant an assessment upon the abutters. It was so held in State *v.* Reis, 38 Minn. 371, 38 N. W. 97, and in Reinkin *v.* Fuehring, 130 Ind. 382, 30 N. E. 414, although the cases generally which uphold such assessments relate to improvements of a permanent character. Many improvements from which real estate receives an incidental advantage are held to justify only general taxation. Hammett *v.* City of Philadelphia, 65 Pa. St. 146; *In re* Washington Ave., 69 Pa. St. 352; Erie *v.* Russell, 148 Pa. St. 384–386, 23 Atl. 1102; Dyar *v.* Farmington Village Corp., 70 Me. 527; McClosky *v.* Chamberlin, 37 N. J. Law, 388; Dietz *v.* Neenah, 91 Wis. 422–427, 64 N. W. 299, and 65 N. W. 500.

Watering Streets —Assessing Abutting Property—Constitutional Law.

Treating the watering of a street in a city as a work which may cause a direct, special, and peculiar benefit to abutting estates, and thus enhance their value so long as it continues, we come to the question whether the mode of assessment directed by this statute is within the constitutional power of the legislature. Section 2 of the statute is as follows: "If a city shall determine that the streets or certain streets or portions of streets within its limits shall be watered in whole or in part at the expense of the abutters, the expense of the watering of such streets or portions of streets for that municipal year, and the proportion of such expense to be borne by abutters, and the rate to be assessed upon each linear foot of frontage of estate upon such streets or portions thereof, shall be estimated and determined by the board of aldermen, and the expense so determined of such watering to be borne by the abutters, shall be assessed in the manner hereinafter provided upon the estates abutting on such

streets or portions of streets, in proportion to the number of linear feet of each estate upon the street or portion thereof so watered." Section 3 provides for a determination of the amount of the assessments, either by the board of aldermen, or by that one of several other specified boards of public officers which the aldermen may designate. Section 4 declares that each assessment shall be a lien upon the estate on which it is laid, and directs the collection of assessments in like manner as other taxes are collected, and provides for abatements. It is now established by the highest judicial authority that such assessments cannot be so laid upon any estate as to be in substantial excess of the benefit received. The case of Village of Norwood *v.* Baker, 19 Sup. Ct. 187, contains an elaborate discussion of the subject, with a citation of authorities from many of the states, and holds that a local assessment for an amount in substantial excess of the benefit received is in violation of the fourteenth amendment to the constitution of the United States, inasmuch as it would deprive one of his property without compensation, and so without due process of law. The authority of this case is controlling in all state courts, and, if it were not, it is in accordance with sound principles, and with the great weight of authority in other courts. The principles which have often been stated by this court lead to the same result. City of Boston *v.* Boston & A. R. Co., 170 Mass. 95–101, 49 N. E. 95, and cases cited. The case of *In re* Kingman, 153 Mass. 566, 27 N. E. 778, dealt with a legislative distribution of public burdens among different political subdivisions of the commonwealth, and the language in it must be construed in reference to the facts to which it relates. The right to apportion public burdens among cities, towns, and counties, as it deems reasonable in reference to benefits and to other considerations which are not capable of exact estimation in money, is within the power of the legislature, under the first part of article 4, § 1, c. 1, of the constitution, and is not the same as the right to impose and levy taxes upon individuals. It is of the same nature as the right to create, change, or

abolish cities, towns, or other political subdivisions of the commonwealth.

While these assessments must be founded upon benefits, the courts have generally recognized the difficulty, and in many cases the impracticability, of attempting to estimate benefits to estates one by one without some rule or principle of general application which will make the assessments reasonable and proportional, according to the benefits. Accordingly, the determination of such a rule or principle by the legislature itself, or by the tribunal appointed by the legislature to make the assessments, has commonly been upheld by the courts. If, however, its effect plainly is to make an assessment upon any estate substantially in excess of the benefit received, it is set aside. Weed *v.* Boston, 171 Mass. —, 51 N. E. 204; Village of Norwood *v.* Baker, *ubi supra.* Assessments of special taxes by an estimate of the particular benefits to each lot, by measurement of the amount of frontage upon a street or sewer, by the measurement of the area of the lots, and by a valuation of the property, have all been sustained. City of Springfield *v.* Gay, 12 Allen, 612; Dorgan *v.* City of Boston, Id. 223; Downer *v.* Same, 7 Cush. 277; Wright *v.* Same, 9 Cush. 233; Workman *v.* City of Worcester, 118 Mass. 168; Keith *v.* City of Boston, 120 Mass. 108; Snow *v.* City of Fitchburg, 136 Mass. 183; Howe *v.* City of Cambridge, 114 Mass. 388; Chapin *v.* City of Worcester, 124 Mass. 464; Codman *v.* Johnson, 104 Mass. 491; Leominster *v.* Conant, 139 Mass. 384, 2 N. E. 690. But, as we have already intimated, the only ground on which they can properly rest is that they are methods reasonably determined upon, by the tribunals charged with the duty of determining, in reference to the ascertainment of the benefits actually received by the different estates on which assessments are to be laid. It may be that, in the light of recent decisions, some of these cases would have been decided differently; but, in general, they rest on sound principles, on the grounds already stated. Most of our

cases and our statutes assume, under the constitution, that these assessments, like other taxes, are to be reasonable, and, in a general sense, proportional.

Under the present statute, it is implied that the board of aldermen and the tribunal making assessments will proceed upon correct principles, and assess according to the benefits received, unless the requirement that the assessments are to be "in proportion to the number of linear feet of each estate upon the street or portion thereof so watered," is objectionable, as founded on a wrong principle. Such requirements in regard to ordinary estates fronting upon streets and sewers have often been upheld. On the other hand, in reference to estates differently situated, they sometimes would call for assessments far beyond any benefit received, and would therefore be unconstitutional and void. Weed *v.* City of Boston, *ubi supra*. No facts appear in the present case to show that this rule is not proper in its application to the petitioner's estates, as a method of determining benefits with such approximation to accuracy as can reasonably be required. There may be unoccupied lands in the city which are so situated that they could receive no substantial benefit, either actually or potentially, from the watering of adjacent streets, so long as they remain in their present condition. Assessments made upon such lands might be void; but, as the case does not disclose such, we have no occasion to consider them. We see no reason why the legislature may not authorize a city to water some of its streets at the public expense, and to assess benefits for the watering of others upon abutters, as it deems best. As a result, some landowners get the benefit of watering streets adjacent to their estate without paying for the special benefit. But perfect equality in the distribution of public burdens is not attainable. We are therefore of opinion that, in its application to the facts of the present case, the statute is constitutional.

Same—Constitutionality of Statute.

If the aldermen might cause some of the streets to be

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watered at the expense of the city, and others to be watered at the expense of the abutters, it is not shown that their determination in regard to it was improper. Although the proceedings were in some respects informal, we see no fatal error in them. We are inclined to agree with the petitioner's counsel in his contention that the determination of the expense of watering streets to be watered in whole or in part at the expense of the abutters, and the proportion of such expense to be borne by the abutters, and the rate to be assessed upon each linear foot of frontage of estates upon which such streets or portions thereof abut, is to be by the board of aldermen, and cannot be delegated to any other board or tribunal. But we are also of the opinion that the action of the superintendent of streets in making those assessments, and reporting them to the board of aldermen, with the communication of the mayor and the subsequent order asking an appropriation, taken in connection with the previous orders, are equivalent to an original determination of these matters by the aldermen themselves. The petitioner shows no such error as to entitle him to a writ of *certiorari*. Petition dismissed.

Validity of Assessment.

NOTE.

Assessment for Watering Street.—In State *ex rel.* Stateler *v.* Reis (Minn.), 20 Am. & Eng. Corp. Cas. 473, it was held that street-sprinkling is a "local improvement" within the meaning of sect. 1, art. 9, of the Minnesota Constitution, for which an assessment may be levied upon the property fronting on the street in proportion to its linear foot frontage, without regard to its cash valuation.

MEYER *et al.*

v.

JONES.

SAME

v.

TATUM *et al.*

(*Court of Appeals of Kentucky, March 1, 1899.*)

Removal of Carcasses—Validity of Ordinance.*—A city can, by ordinance, compel the owner of a dead animal to remove it from a street within a specified time, and if he fails to do so, the city can have it removed at his expense, but such ordinance is invalid if it does not give the owner the right to remove the carcass within a prescribed time before the public contractor takes charge of it.

APPEAL by plaintiffs from Jefferson county circuit court. *Affirmed.*

Kohn, Baird & Spindle, for appellants.

Pryor, O'Neal & Pryor, for appellees.

PAYNTER, J. In the case of Knauer *v.* City of Louisville, 45 S. W. 510, this court had under consideration the question of the validity of an ordinance of the city of Louisville providing for and fixing charges for the removal of the carcasses of dead animals. We held that dead animals were not *per se* nuisances, and that the city had the right to prevent their carcasses from becoming nuisances, and to that end might prescribe the manner of and the time in which the owners should remove them, etc. In response to a petition for rehearing in that case (46 S. W. 701), the court said: "That the municipality has the right, and it is its duty, to prevent carcasses of dead animals from becoming nuisances, and to that end it may prescribe the manner of and the time in which the owners shall remove them. We may add that

*See note at end of case.

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the general council may provide by ordinance that, in the event the owner of a carcass of a dead animal fails to remove it within the prescribed time, or pay such reasonable fee as may be fixed for its removal, it shall become the property of the city, or of such person as may be authorized by contract with the city to remove it; or it may be provided that, upon the failure of the owner to remove it within the prescribed time, it shall become the property of the city, or of such person as may be authorized to remove it." It seems to us that in this response to the petition for rehearing the court fully and clearly pointed out the character of ordinance which the city could enact that would fully respect the property rights of the owners of dead animals, and at the same time give the inhabitants of the city full protection from the danger of dead animals becoming nuisances. The city can, by ordinance, compel the owner of a dead animal to remove it within a certain time, and prescribe the manner in which it shall be conveyed over the streets of the city. If the owner fails to do it within the time prescribed in the ordinance, then the city can employ such method or instrumentalities as it pleases for the removal, and fix the compensation to be paid therefor. The ordinance in question does not fix fees for the removal of dead animals at excessive rates, as did the ordinance under consideration in the Knauer Case, but it is still objectionable because it does not give the owner of a dead animal the right to remove, or have it removed, within a prescribed time before the public contractor takes charge of it. The judgments are affirmed.

NOTE.

Removal of Carcasses—Validity of Ordinance.—In River Rendering Co. *v.* Behr, 77 Mo. 91, it was held that in an ordinance conferring upon one person the right to *remove and convert to his own use dead animals*, to the exclusion of their owners' rights, held unconstitutional as being a taking of private property for public use without compensation, and as depriving a person of his property without due process of law.

DELAWARE, L. & W. R. CO.

v.

CITY OF BUFFALO *et al.*

(*Court of Appeals of New York, Feb. 28, 1899.*)

Streets—Obstructions—Powers of Municipality.*—A municipality may forcibly remove an obstruction from a street.

Same—Same—Railroads.*—A railroad corporation, having general legislative authority to cross a street with its tracks, cannot occupy a large portion of it with bridge supports against the will of the city authorities.

Same—Same—Authority of Common Council.*—The common council of a city, in the exercise of the power to permit railroads to cross streets, is not authorized to surrender to a railroad the exclusive use of a considerable portion of a street for the erection of bridge supports.

APPEAL by plaintiff from appellate division, Fourth department supreme court. *Affirmed.*

John G. Milburn, for appellant.
W. H. Cuddeback and *C. V. Nellany*, for respondents.

O'BRIEN, J. About the year 1882 the plaintiff, a railroad corporation, constructed its railway across Main street, in the city of Buffalo, at an elevation of 12 feet above the surface of the street. The structure rests upon abutments and piers, all placed in the street, which at that point is 99 feet in width. The abutments and piers to support the structure occupy about one-half of the width of the street. On the 26th of May, 1890, the common council of the city passed a resolution directing the street commissioner to notify the plaintiff to remove the abutments within 90 days, and, if not complied with within that time, then that the commissioner remove the same, and charge the expense to the plaintiff. This resolution having been ap-

Case Stated.

*See notes at end of case.

proved by the mayor, the commissioner notified the company to remove the abutments within 90 days, and threatened, if it was not done within that time, to forcibly remove them. The plaintiff brought this action to procure a perpetual injunction against the city and the commissioner, enjoining and restraining them from in any way interfering with the bridge or its abutments. It is alleged in the complaint that the structure was erected by the plaintiff under and in pursuance of legislative and municipal authority, and that it is a lawful structure in all respects, which the plaintiff has a right to maintain. These allegations are all put in issue by the answer. On the trial the plaintiff's complaint was dismissed. The trial court made findings of fact and law, in which all facts with respect to the circumstances under which the structure was erected are fully stated. It was found, among other things, that the pier, abutment, and earth embankment in the street are obstructions to public travel that materially delay and inconvenience the public in the use of the street: that the plaintiff, in erecting the structure, did not restore the street intersected by it to its former state, or to such state as not to have unnecessarily impaired its usefulness, and that the street has been and is impaired by the existence therein of the pier, abutment, and embankment of earth; that the city has power, under its charter, to remove obstructions from the streets and to prevent encroachments thereon; and that the street commissioner, who has been made a defendant, is charged with the duty of removing such obstructions, under the direction of the common council. From the judgment entered upon this decision the plaintiff appealed to the appellate division, where it was affirmed.

It appears that on the 10th of October, 1881, the common council of the city, upon the written petition of the plaintiff, granted permission to it to construct its railroad through the city and to cross with its tracks several streets, including Main street; the crossing at that street "to be by bridge, leaving a clear roadway underneath at least twelve feet in height and twenty-eight feet in clear, and subject to the ap-

proval of the city engineer." The plaintiff, upon the passage of this resolution, and without presenting to the common council or the engineer any plan of the proposed work, was proceeding in the construction so that the same would be 28 feet in width in the clear and at least 12 feet in height, both of the abutments being located in the street. The common council then passed a resolution directing the plaintiff to put a span of at least 66 feet at the crossing, and notified the plaintiff to that effect. This resolution was passed, and notice given upon the advice of the city engineer. On the 16th of January, 1882, the common council passed another resolution, in which it was stated that through an oversight on the part of that body, or of some of its members, a grant had been given to the plaintiff to cross Main street in such a way as to do great injustice to the citizens in that vicinity and to the community at large; and it was then resolved that the council would not receive, entertain, or act upon any petitions or requests of the plaintiff until its agents should pledge themselves to cross Main street with a bridge having a span of the full width of the street. It does not appear that the common council ever gave its assent in any other way to the construction of the bridge in question. But the trial court found that in the month of December, 1881, while the plaintiff was proceeding with the construction of the crossing, there was a conference between the city engineer, the street committee of the common council, and various officers of the plaintiff, in which it was agreed that the plaintiff should modify its plans for such crossing so that the same should be constructed as it was afterwards actually constructed, and that the plaintiff proceeded to construct the crossing in accordance with the plans as so modified, with the approval of the city engineer. It does not appear that this approval was in writing, or that any specific plan was ever made or filed with the city, of which the engineer formally approved.

It is urged by the learned counsel for the plaintiff that the

city authorities have no right to forcibly remove this structure over the street. That depends upon the question whether it was or was not an encroachment upon the public right and an obstruction. If it was, the city had the right to remove it. If, by the increase of population, or the increase in the public travel, the street had become dangerous, in consequence of the existence of the abutments and piers, the city would be clearly liable for any damages which persons, in the lawful use of the highway, sustained by accidents due to the presence of such obstructions in the street. It is quite true that the city authorities would act at their peril in interfering with the plaintiff's property, and this summary method of removing the obstruction could be justified only by proof in a court of justice, when the authorities were called upon to defend their act, that the structure was in fact such an obstruction in the street as they were authorized to remove. The legislature had conferred upon the city authorities the power to summarily abate a nuisance or remove an obstruction from the highway when existing, and in any suit against them by the plaintiff for their acts they could justify only by showing that the nuisance or obstruction in fact existed. People *v.* Board of Health, 140 N. Y. 1, 35 N. E. 320. But the city authorities did not attempt to tear down this bridge, and it has not been torn down. The plaintiff continues to maintain it under the injunction order which it procured at the time of the commencement of the action. All the city authorities did was to force the plaintiff to commence this action instead of commencing a like action themselves. It is of no consequence now whether the direction of the common council to the street commissioner to remove the obstruction was or was not the proper method of proceeding. The parties are now in court, and the sole question is whether, upon the conceded facts, the plaintiff has a right to maintain this structure against the decision of the governing body in the city that it is an obstruction in the street.

Streets—Obstructions—Powers of Municipality.

The learned counsel for the plaintiff contends that, since the structure has the sanction of legislative and municipal authority, it cannot in law be an obstruction or a nuisance which the common council may remove. The assertion that this bridge has the sanction of legislative authority is not quite correct. It is true that railroad companies are authorized to construct their roads across, along, or upon any street or highway in a city with the assent of the municipal authorities. That is simply a general authority to cross streets with the consent of the local authorities. When a railroad company relies upon a legislative act as a justification for an encroachment upon public or private rights, or, as in this case, as a justification for the occupation with its piers and abutments of a public highway, it must show that the statute authorized in express terms or by clear and unquestionable implication the doing of the very acts complained of, or that the statute was imperative, and could not be executed without causing a nuisance. The plaintiff had general legislative authority to cross the street in question, but it had no express authority to occupy a large portion of the public highway with abutments and piers for the support of its structure, to the great inconvenience and detriment of the public. Nothing less than express authority to place these obstructions in the street will shelter the plaintiff from the consequences of creating a nuisance by the obstruction of a public highway. Hill *v.* City of New York, 139 N. Y. 495, 34 N. E. 1090; Bohan *v.* Gaslight Co., 122 N. Y. 18, 25 N. E. 246; Cogswell *v.* Railroad Co., 103 N. Y. 10, 8 N. E. 537; Morton *v.* City of New York, 140 N. Y. 212, 35 N. E. 490; Hill *v.* Asylum, 4 Q. B. Div. 433, on appeal 6 App. Cas. 193; Truman *v.* Railway Co., 25 Ch. Div. 423. So the contention that a statute, general and permissive in its terms, justifies the plaintiff in maintaining the particular structure in question, against the will of the city authorities, cannot be sustained.

Same—Same—Railroads.

It is equally clear that the plaintiff cannot justify the occu-

pation of the street upon the ground that the municipal authorities originally consented to the erection of the structure. The common council of the city has no power to surrender a public street to the use of a railroad corporation. All it had the power to do was to consent to the crossing, and the same law which authorized a consent imposed a duty upon the company to restore the street to its former state or to such state as not to have unnecessarily impaired its usefulness. It had no more power to surrender half of the street to the use of the plaintiff than it had to surrender the whole of it. Permission to cross this street by means of an elevated structure was not a permission to occupy the roadbed or a great portion of it with solid structures that interfered materially with the use of the highway by the traveling public. Davis *v.* Mayor, etc., 14 N. Y. 506; Cohen *v.* Same, 113 N. Y. 532, 21 N. E. 700. Indeed, the common council, as before remarked, never assented to the erection of this particular structure, as will be seen from the resolutions passed during its construction and which have already been referred to. The last resolution which the common council passed on the subject was in the nature of a protest against the erection of the structure in the manner that it now exists and is maintained. Whatever consent the plaintiff ever had for the erection of the structure was derived from the city engineer and the committee of the common council. That seems to have been a verbal arrangement between the officers of the plaintiff, the committee of the common council, and the city engineer, which was never reduced to writing or made a matter of record. Such an arrangement could not bind the city to permit the plaintiff to use the street in question for private purposes. Much less can it be said that such an arrangement could bind the city authorities in the future, when, by the increase of population or for any other reason, the piers and abutments became obstructions, interfering materially with the rights of the public. It is quite sufficient to say, therefore, that the municipal authorities, in the ex-

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ercise of the powers to permit railroads to cross streets, are not authorized to surrender to the railroad the exclusive use of a considerable portion of the street for the erection and maintenance of abutments and piers to sustain an elevated structure. Moreover, when the proceedings of the common council are all read together, they are not open to the construction put upon them by the learned counsel for the plaintiff. It is quite plain, I think, that the governing body in the city never gave its consent to the erection of the particular structure now complained of. It follows that the plaintiff was not entitled to maintain this action, and that the complaint was properly dismissed. The judgment should therefore be affirmed, with costs. All concur, except BARTLETT, J., not voting. Judgment affirmed.

Same—Same—Authority of Common Council.

NOTES.

Summary Removal of Obstruction.—Section 1326, Wis. Rev. St., which provides that "whoever shall obstruct any highway, shall forfeit for every such offense a sum not exceeding $25, and the overseers of the proper district shall cause such obstruction immediately to be removed" applies only to cases where the obstruction was intentional, wilful or malicious, and does not authorize the overseer of highways to remove a fence which had existed for 17 years, did not incommode the public use of the highway, and had evidently been erected by innocent mistake as to the true line. Pauer *v.* Albrecht, 72 Wis. 416; citing Childs *v.* Nelson, 69 Wis. 125; State *v.* Leaver, 62 Wis. 387; Hubbell *v.* Goodrich, 37 Wis. 84; State *v.* Preston, 34 Wis. 675.

Same—Apparent Obstruction.—But where the city charter gives to aldermen power to remove in a summary manner any nuisance, obstruction or encroachment upon the streets of the city, and the encroachment is readily ascertainable and quite apparent, and the fence has been intentionally and wilfully maintained after the property owner knew that it was erected in a public street, the aldermen of the city are justified in removing it summarily. Childs *v.* Nelson, 69 Wis. 125. HORTON, J., who delivered the opinion of the court said:—"It is contended, further, that this fence has been so long in

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the street, or the boundary of the plaintiff's possession, that it cannot be removed summarily as an encroachment. The learned counsel of the appellant cites many respectable authorities to show that permanent and valuable improvements, made within a street or upon public grounds in good faith, and where the right was at least doubtful, and summary removal would result in great damage, and such like encroachments are not subject to removal in the manner pursued in this case. The cases of State *v.* Mayor, etc., of Hightstown, 45 N. J. L. 501, 4 Am. & Eng. Corp. Cas. 521, and of State *v.* Jersey City, 34 N. J. L. 31, are cited as having arisen under a similar charter power of summary removal, and in which it was held that such a power 'was a mere public power' ministerial in its nature, and designed to relieve the public from such obstructions in streets as are apparent and readily ascertainable without the necessity of adjudication,' etc. With all due deference to the learned counsel, it would seem that this was just such a case as last described. So far as this plaintiff is concerned, he had not the shadow of a right to question the legality of this street. He purchased subject to it. The encroachment was readily ascertainable, and, indeed, was quite apparent; and the facts show that the plaintiff ought not to have sought any adjudication of his rights, but should voluntarily, like a good citizen, have removed his fence from the street as soon as he learned that it was an encroachment, and he must have known it by the terms of his own deed, and by record evidence of the dedication of St. Croix street by a map or plat fixing the south line of block J and the south line of block 7 as the north line of the street. The plaintiff would seem to have maintained and kept his fence within the street intentionally and willfully after he must have known that St. Croix street was a lawful street, and the exact north line of it is the south boundary of his own lot. This would make its summary removal by the proper legal authorities lawful and justifiable under the general statutes. State *v.* Leaver, 62 Wis. 387; Hubbell *v.* Goodrich, 37 Wis. 84; State *v.* Preston, 34 Wis. 675."

Same—Distinction Between Obstructions and Encroachments.—Section 1326, Wis. Rev. St., authorizing the summary removal of obstructions in streets, and § 1330 relative to the encroachment upon highways "by a fence, building or other fixture," make a distinction between an obstruction and an encroachment upon a highway, and a fence standing in the highway cannot be deemed an obstruction within the meaning of the statute. Accordingly, where the supervisors have notified the owner of property to remove his fence as an encroachment upon the highway and he has thereupon denied the encroachment, the supervisors should take

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the steps pointed out by statute to determine whether an encroachment has been made; and cannot maintain an action to recover the penalty prescribed by § 1326 for unlawfully obstructing it. State *v.* Pomeroy, 73 Wis. 664. COLE, C. J., who delivered the opinion of the court, said:—"The action is brought under § 1326, Rev. St., to recover the penalty for obstructing a highway. If the fence in question really was in the highway, as claimed by the plaintiff, it was an encroachment, as defined in § 1330 and subsequent sections. It will be noticed that the statute makes a clear distinction between an obstruction and an encroachment upon a highway. It speaks of a highway lawfully opened, being encroached upon 'by a fence, building, or other fixture,' and points out the method of proceeding to determine whether it is an encroachment or not, and fixes the penalty for failure to remove it on notice. In the statutory sense, an encroachment is a fixture which intrudes into or invades the highway, but does not necessarily prevent public travel. An obstruction may prevent, or hinder and delay, travel, in a greater or less degree, or render the use of the highway dangerous. The legislature has seen fit to make this distinction in the law, and the court has endeavored to maintain it in the construction of this statute. Thus in State *v.* Leaver, 62 Wis. 387, MR. JUSTICE LYON says: 'It is difficult to lay down any general rule by which to determine, in any given case, whether an object placed in a highway is an obstruction within § 1326, or only an encroachment within the meaning of § 1330. It may safely be said that an object or structure, to be an obstruction, need not necessarily be such as to stop travel on the highway. A man may willfully place a load of hay or a pile of wood in the middle of the street, and leave it there. This would not be an encroachment within § 1330, because it is not a 'fence, building, or other fixture.' Yet it would undoubtedly be an obstruction within the meaning of § 1326, although room was left on either side of it for travelers on the highway to pass.' See, also, Pauer *v.* Albrecht, 72 Wis. 416, where the same distinction is observed. Now, it is very obvious that there could be no recovery of the penalty given by § 1326, for what was properly an encroachment within the meaning of the other sections. To sustain such a recovery would be confounding and disregarding all the marked distinctions between an 'obstruction' and an 'encroachment,' which we have just dwelt upon. It would be a plain perversion of the provisions of the statute to allow a recovery of the penalty for an encroachment which is given for an obstruction. This, it seems, is too plain to require argument. The legislature has treated the two things as different in their nature and consequences. The overseer of the proper district is authorized to cause an obstruction to be

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summarily removed, while, as we have said, a method is pointed out for determining the question whether an encroachment has been made, and penalty is prescribed where the occupant suffers the encroachment to continue after its character has been determined. In this case, it appears, the supervisors made an order under § 1330, declaring that the fence encroached upon the highway, and requiring the defendant to remove it. A copy of this order was served upon the defendant, who denied, in writing, within 30 days, the encroachment, as provided in §§ 1331, 1332. This denial was addressed to the supervisors, and served upon one of them. The supervisors should then have taken steps which the statute points out to determine whether an encroachment had been made. This proceeding is made very plain by the subsequent provisions, which afford an ample remedy for removing such encroachment. But, instead of pursuing this remedy, this action was brought to recover the penalty given for obstructing a highway."

Effect of Legislative Grant as Affecting Liability.—A company authorized by legislative grant to build and operate a railroad, is thereby relieved from liability for many of the consequences attending the construction and operation of the road, which, in the absence of such grant, would be actionable. The railroad is raised to the dignity of a public use, and the advantages secured to the general public are presumed to compensate for the inconveniences suffered. Uline *v.* New York Cent.,etc., R. Co., 101 N. Y. 96, 23 Am. & Eng. R. Cas. 3; Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202; People *v.* Law, 34 Barb, (N. Y.) 494; Rex *v.* Pease, 4 B. & Ad. 30, 24 E. C. L. 17 (PARKE, J.); Rex *v.* Russell, 6 B. & C. 566, 13 E. C. L. 254.

Therefore, so long as it keeps within the scope of the power granted, a railroad company is completely protected from civil or criminal liability for nuisances arising as a natural and necessary result of the construction and operation of its road. State *v.* Louisville, etc., R. Co., 86 Ind. 114, 10 Am. & Eng. R. Cas. 286; Hatch *v.* Vermont Cent. R. Co. 28 Vt. 142; Randall *v.* Jacksonville, etc., R. Co., 19 Fla. 409, 17 Am. & Eng. R. Cas. 184; Laviosa *v.* Chicago, etc., R. Co. (La. 1881), 4 Am. & Eng. R. Cas. 128; Chope *v.* Detroit, etc., R. Co., 37 Mich. 195, 26 Am. Rep. 512; London, etc., R. Co. *v.* Truman, L. R., 11 App. Cas. 45, 25 Am. & Eng. R. Cas. 116 (maintaining cattle yards not enjoinable when on land acquired by statute for that purpose); Randall *v.* Pacific R. Co., 65 Mo. 325; State *v.* Louisville, etc., R. Co., 86 Ind. 114, 10 Am. & Eng. R. Cas. 286; Rogers *v.* Kennebec, etc., R. Co., 35 Me. 319; Uline *v.* New York Cent., etc., R. Co., 101 N. Y. 98, 23 Am. & Eng. R. Cas. 3 (leading case); Billinger *v.* New York Cent. R. Co., 23 N. Y. 43; Conklin *v.* New York, etc., R. Co., 102 N. Y. 107; People *v.* Law, 34 Barb. (N. Y.) 94; Eaton *v.* Boston, etc.,

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R. Co., 51 N. H. 504, 12 Am. Rep. 147; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339; Tennessee, etc., R. Co. *v.* Adams, 3 Head (Tenn.) 596.

Compare First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. (N. Y.) 79.

A railroad track laid upon a street of a city by authority of law, properly constructed and operated in a skillful and careful manner, is not in law a nuisance. Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203, 27 Am. & Eng. R. Cas. 415.

If a railroad is not built or operated negligently, and the charter authorizes the laying of tracks on a street, the soot, obstructions, jarring, danger, etc., do not constitute a nuisance. The burden of proof of such negligence is upon the party complaining. Randle *v.* Pacific R. Co., 65 Mo. 325; Parrot *v.* Cincinnati, etc., R. Co., 10 Ohio St. 624.

A railroad company, having the right to use streets in a town, cannot be charged with maintaining a public nuisance, where the obstruction caused by their tracks, switches, cars, etc., is no greater than is required by a reasonable use. State *v.* Louisville, etc., R. Co., 86 Ind. 114.

But where a railroad company is authorized to construct its road across any stream of water in such a way as not to impair its usefulness, it is liable for damages caused by the overflow of the stream, owing to the peculiar construction of the bridge. Brown *v.* Cayuga, etc., R. Co., 12 N. Y. 486; Lawrence *v.* Great Northern River Co., 16 Ad. & El. 643, 71 E. C. L. 643, 20 L. J., Q. B. 293, 6 Ry. Cas. 656.

The rule as to relief from liability, conferring powers so plainly in derogation of common right, is to be strictly construed, and cannot be allowed to extend so far as to exempt companies from liability for unnecessary or unauthorized nuisances. Richardson *v.* Vermont Cent. R. Co., 25 Vt. 465, 60 Am. Dec. 283; Reg. *v.* Bradford Nav. Co., 6 B. & S. 631, 118 E. C. L. 628; Biscoe *v.* Great Eastern R. Co., L. R., 16 Eq. Cas. 640; Harmon *v.* Louisville, etc., R. Co., 87 Tenn. 614.

Thus where a railroad authorized by its charter to be made at one place is made at another, it is a mere nuisance on every highway it touches in its illegal course. Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339.

The statutory sanction which will justify an injury to private property must be expressed or must be given by clear and unmistakable implication from the powers expressly conferred, so that it can be fairly said that the legislature contemplated the doing of the very act which occasioned the injury. Cogswell *v.* New York,

Notes

etc., R. Co., 103 N. Y. 10, 27 Am. & Eng. R. Cas. 376, 57 Am. Rep. 701.

In the case of Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 11 Am. & Eng. R. Cas. 15, an act of Congress had authorized a railroad company to bring its tracks within the limits of the city of Washington and to construct such works as were necessary and expedient for the completion and maintenance of its road. It was held that whatever might be the extent of the authority conferred, it was accompanied by the implied qualification that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. And therefore when the company under such act had constructed workshops immediately adjoining a church building, and in the necessary use of these shops, created much noise, smoke, soot, etc., whereby the worshippers in the church were greatly discommoded and the usefulness of the church greatly impaired, the authority granted constituted no defense, and the company was liable for the injuries resulting even from a proper conduct of such workshops. See also First Baptist Church *v.* Schenectady, etc., R. Co., 5 Barb. (N. Y.) 79. *Compare* First Baptist Church *v.* Utica, etc., R. Co., 6 Barb. (N. Y.) 313.

General authority to run the road through a street does not give the right to use such street as a terminal point. Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1 (as a freight yard). Neitzey *v.* Baltimore, etc., R. Co., 5 Mackey (D. C.) 34, 26 Am. & Eng. R. Cas. 553.

Obstructions in Streets.—A municipality of itself cannot, unless expressly sanctioned by the legislature, authorize the erection of obstructions upon its streets. Pittsburgh *v.* Scott, 1 Pa. St. 309; Com. *v.* Rush, 14 Pa. St. 186; Columbus *v.* Jacques, 30 Ga. 506; People *v.* Vanderbilt, 26 N. Y. 287, 84 Am. Dec. 351; People *v.* Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351; Shaubut *v.* St. Paul, etc., R. Co., 21 Minn. 502.

CITY OF DENVER *et al.*

v.

SHERRET.

(*Circuit Court of Appeals, Eighth Circuit, June 27, 1898.*)

Citizenship.—A citizen of Kansas went to Colorado for the purpose of securing a position in its public schools as a teacher, intending, however, to return if unsuccessful; and was injured in Denver before the result of her examination by the school board of that city was known. When sufficiently recovered, she returned to Kansas, and remained there until she brought an action for such injury, a few months later. *Held*, that she was a citizen of Kansas when she brought the action.

Electric Light Poles—Inspection by City.*—A city is not liable for injuries resulting from defective poles properly located in its streets by electric light companies, unless it had actual or constructive notice of the existence of danger to the public in the use of the streets because of such defects, and did not use diligence in obviating the danger.

Parties.—The complaint charged that defendants, the city and the electric company, were jointly liable, and defendants' pleadings did not raise the question, whether they were properly joined. *Held*, that a motion to require plaintiff to elect which defendant she would proceed against was merely an appeal to the discretion of the trial court.

Inspection of Poles.*—Electric companies are not insurers of the safety of the public against all dangers arising from the lawful placing of poles in streets; and it was error to charge, in substance, that such companies are bound to make such examinations of their appliances as will certainly discover all hidden defects therein.

Same—Knowledge of Employee—Notice to Master.—It was not error to charge that if a lamp trimmer in the employ of the electric company, discovered 10 or 15 days before the accident, the unsafe condition of the pole causing the injury, such knowledge on his part would be notice to the company, whether or not he reported the fact to any other employee or officer of the company, it appearing that it was his duty to examine such poles.

Contributory Negligence.—Plaintiff's injury having been caused by the fall of a defective pole, she could not be charged with con-

*See note at end of case.

City of Denver *v.* Sherret

tributory negligencc upon the ground that she was, when struck, crossing the street diagonally, and not at a place ordinarily used as a crossing.

Damages—Instructions.—It was error to assume, in charging as to the damages recoverable, that, if the accident had not happened, plaintiff would certainly have continued to teach at the same rate of salary she was receiving at the time of the accident for her lifetime, or for the length of time the jury should determine the injury would continue to affect her ability to earn money.

ERROR by defendants to the Circuit Court of the United States for the District of Colorado. *Reversed.*

T. J. O'Donnell (Milton Smith, on brief), for plaintiffs in error.

D. V. Burns, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. This action was brought in the circuit court for the district of Colorado by the defendant in error against the city of Denver and the Denver Consolidated Electric Company to recover damages for personal injuries caused her by the falling of an electric light pole to which were attached the wires which supported the lamp used in lighting the city streets. In her petition, the plaintiff, as ground of jurisdiction, averred that she was a citizen of the state of Kansas, and that the defendants were corporations created under the laws of the state of Colorado. In the answers filed, the defendants took issue on the averment of the citizenship of the plaintiff, claiming that she had become a citizen of the state of Colorado. The issue thus made was heard and determined before entering upon the merits of the case, and, upon the conclusion of the evidence adduced on that issue, the court instructed the jury to find thereon in favor of the plaintiff, and this ruling is now assigned as error. The point at issue was: Of what state was the plaintiff a citizen when this action was brought, on the 29th day of October, 1897? The evidence showed without dispute that the plaintiff had been born in Hiawatha, Kan., and had lived there all her

Case Stated.

Citizenship

life, as a member of her father's family, being engaged as a teacher in the public schools of that place, until, in May, 1897, she went to the city of Denver, for the purpose of endeavoring to secure a position in the schools of that city; and she and her father both testified that, if she failed in securing such position, it was her intent to return to Kansas, and continue her occupation as a teacher in Hiawatha. On the 21st and 22d days of June, she underwent the requisite examination before the school board of Denver; but, before the result was known, she was injured as stated, and, when sufficiently recovered, she returned to her father's house, in Hiawatha; and since that time she had continued to live at Hiawatha as an inmate of his family. The utmost that could be fairly claimed under the evidence in this case is that is was the purpose of plaintiff to change her place of residence from Hiawatha to Denver in case she was successful in obtaining a position as teacher in the schools of the latter city; but this position was not obtained, and the plaintiff still continues to be a member of her father's family, at Hiawatha. Clearly, therefore, there was not any evidence in the case which would have sustained a finding that on the 29th day of October, 1897, the plaintiff was a citizen of the state of Colorado, and had ceased to be a citizen of Kansas; and, this being true, the court did not err in directing a verdict on this issue in favor of plaintiff, thus sustaining the jurisdiction of the court.

Upon the merits of the case, it appeared from the evidence that the Denver Consolidated Electric Company, under an ordinance of the city of Denver, had obtained the authority to place in the city streets the poles and wires necessary to enable it to furnish electricity for lighting purposes; that, in pursuance of this authority, it had maintained at the intersection of Seventeenth and Stout streets a pole and wires, and also a lamp attached to wires, for the purpose of lighting the street; that on the 22d day of June, 1897, this pole fell down, carrying with it the wires attached thereto, which struck the plaintiff, who was then crossing the street, and

severely injured her. The plaintiff further introduced evidence tending to show that the pole had been erected for a number of years; that it had become rotten in the part subjected to the dampness of the earth, which condition could have been readily discovered by proper examination of the pole; and it was claimed on behalf of plaintiff that both defendants had been guilty of negligence in thus allowing the pole to remain in the street after it had become rotten. Both the city and the electric company are joined as defendants to the action, but it will probably aid in a clear understanding of the questions involved if the case is viewed—First, as an action against the city alone, and, second, as one against the electric company.

In defining the legal duty imposed upon the city, the court charged the jury that:

"The city of Denver, as a municipal corporation, is charged with the duty of keeping the streets in a safe condition. If it does anything directly to render them unsafe, it is liable in damages for the act. If it permits another to do anything which renders the streets unsafe, it is liable, and the person doing it will be liable in the same degree. If the city had erected this pole which fell, and the falling of which, it is alleged, caused the injury, and had allowed it to get into a condition which caused it to fall, it would be liable for any injury resulting from such fall; and permitting another, the Consolidated Electric Company, to maintain the pole, in no manner changes the position of the city in the matter."

Exceptions were duly taken to the cited portions of the charge of the court, and we have thus presented the question whether the charge correctly states the duty imposed by the law upon the city with respect to the poles placed in the streets of the city by the electric company. The court instructed the jury that, as the city was charged with the duty of keeping the streets in a safe condition, it was charged with the duty of inspecting the poles from time to time, in order to ascertain their condition; and, in effect, the court

laid down the rule that the city was bound to do all that would have been required of it had the city itself been the owner of the electric plant, including the poles used in connection therewith. If this liability exists with respect to the poles erected in the streets, it must also exist with respect to the wires and lamps attached thereto, for it will be remembered that it is not claimed that the mere erection of the pole which fell created an unlawful obstruction of the streets; but the theory of the trial court was that, as the city permitted the electric company to erect the pole as part of its lighting system, the city was charged with the duty of inspection, by reason of the duty of the city to keep the streets in a safe condition, and therefore, as the city permitted the electric company to string its wires along the streets, and hang its lamps over the same, the same duty of inspection must exist with respect to the wires and lamps as exists with respect to the poles. It is well known that, in the development of urban life, city streets are now used, under legislative sanction, for many purposes other than for the passage of persons, animals, and vehicles along the same. Underneath the streets may be placed conduits for the conveyance of water and gas, while above ground are found telegraph and telephone wires, electric light and power wires, and electric street-car wires, all suspended along and over the streets, and experience has demonstrated that the presence of these wires creates a new danger in the use of the public highways. If what is called "a live wire" becomes broken and falls into the street, it may cause the death of all persons or animals coming into contact therewith. So, also, it has been demonstrated that, in the running of cable cars through the streets of a city, a danger is created to the public, in that occasionally the machinery forming the grip does not properly act, and the car cannot be stopped, but may be dashed into other vehicles, causing injury to persons and property, or the cable itself may become defective, and thus cause an obstruction to the free use of the street. If the ruling of the trial court in this case is sustained, to the effect that, because the city

permitted the electric company to erect the pole in the street as part of its electric system, the city became charged with the duty of inspecting the pole, the same as though it was owned and operated by the city, then it must follow that, because a city permits the use of its streets for telegraph, telephone, electric light, and power systems, as well as for the use of cable and electric street-car systems, the city is charged with the duty of inspecting all the poles, wires, lamps, cables, and cars used in connection with these systems in the public streets, in order to prevent obstructions being caused to the safe use of the street, through defects in the appliances used for these several purposes.

The trial court charged the jury that, if the city was liable in this case, it was by reason of its omission in the matter of inspection. But it is apparent that inspection is merely a means to an end, and, if the city was under obligation to inspect, it is because the city was under obligation to maintain the pole in a safe condition; and that this was the meaning of the court in its charge is clear from the statement that:

"If the city had erected this pole which fell, and the falling of which, it is alleged, caused the injury, and had allowed it to get into a condition which caused it to fall, it would be liable for any injury resulting from such fall; and permitting another, the Consolidated Electric Company, to maintain the pole, in no manner changes the position of the city in the matter."

Thus, the jury were instructed that they must view the case just as they would be required to do if it appeared that the city had itself erected the pole as part of a lighting system erected, owned, and operated by the city. Any corporation, municipal or otherwise, or any person that may be the owner of an electric light and power plant, is under obligation to use ordinary care in the maintenance and operation thereof, in order to prevent injury to third parties; but it cannot be true that, simply because a municipal corporation permits another to erect and operate such a plant in the city

streets, it becomes charged with the duty of maintaining the poles, wires, and lamps connected therewith in a safe condition. The charge given to the jury was to the effect that the obligation resting upon the city was just the same as though the city had erected and owned the pole; that, therefore, it was under obligation to inspect the pole from time to time, to the end that it should be kept in a safe condition; and that if, through the failure to properly inspect the same, it was allowed to become rotten and fall, the city would be liable for the results thereof. If this is a correct statement of the law, it follows that with respect to all the appliances in the shape of poles, wires, lamps, cables, and the like placed in the city streets, by telegraph, telephone, electric light, electric power, electric and cable street-car companies, there rests a primary duty and obligation upon the city to keep them in safe condition, and to make the inspections necessary to detect defects in order that the same may be promptly repaired. If this duty rests upon the city, then it will be compelled to keep in its employ men who possess the knowledge and skill needed to detect, and, when detected, to repair and keep in proper condition, the electric wires and the cables and other appliances used in the streets; and it is apparent that this would, of necessity, lead to a conflict, in many instances, between the city and the companies owning and operating the electric and cable plants. In support of the charge of the court upon this point, counsel for the defendants in error cite a number of cases decided by the supreme court of the United States and the supreme court of Colorado, in which the duty of inspecting the streets is recognized; but they are all cases based upon defects in bridges, sidewalks, or carriageways, wherein the primary duty of erecting and maintaining the same, as part of the highway, was upon the city, and wherein the duty of inspection exists, because the duty of keeping in repair rests primarily upon the city; but none of these cases involved the point now under consideration. In this case, the trial court held, and

the contrary is not contended for by counsel for defendant in error, that the original erection of the pole was lawful, and did not constitute an obstruction in the street; and therefore the question is narrowed down to the point whether the city is bound to inspect from time to time all poles, wires, lamps, and cables that may be lawfully placed in the streets, for defects therein, and to repair such defects in order to prevent them becoming an obstruction to the safe use of the streets, or whether the rights of the public are not sufficiently protected by imposing the duty of keeping watch over these appliances upon the corporation or person owning and operating the same, and holding the city liable only in cases wherein, after actual or constructive notice of the existence of danger to the public in the use of the street, growing out of or caused by some defect in the poles, wires, or other appliances, the city does not use diligence in obviating the danger thus created. Believing this to be the extent of liability incurred by the city under such circumstances, it follows that the trial court erred in holding that the same rule must obtain as would be applicable if the city had itself erected the pole for its own purposes.

Electric Light Poles—Inspection by City.

Coming now to a consideration of the errors relied on as grounds for reversing the judgment against the electric company, the first one presented is that the trial court erred in overruling the motion made by the defendants when the case was called for trial, that the plaintiff be required to elect whether she would proceed against the city of Denver alone, or against the electric company alone, on the ground that the defendants were not joint tort feasors, and were not jointly liable to plaintiff. In form, the complaint charges the defendants with a joint liability. The defendants did not, by motion or demurrer, present the question whether they were properly joined in the action, and in the answers filed no issue or question of this nature was presented. The case coming on for trial, the defendants then moved that plaintiff be required to elect whether she

Parties.

would proceed against the city or the electric company, which was, in effect, asking the court to order separate trials. As the record then was, this was but an appeal to the court to exercise its discretion in determining whether there should be separate trials of the issues presented by the answers. If the motion had been granted, and plaintiff had elected to proceed against the city, the case would still be left pending against the electric company, as the motion did not ask a dismissal of the case as against either defendant. Motions of this character, being but appeals to the discretion of the trial court in regulating the order of trial, do not usually present questions upon which an appeal lies, and this case is not an exception to the general rule.

The principal grounds relied on for a reversal of the judgment against the electric company are found in the charge of the court, touching the duty of the company with respect to the pole erected by it, it being claimed on behalf of plaintiff in error that the court, in effect, made it the duty of the company to exercise such a supervision of the poles forming part of its system that it would certainly detect defects therein rendering the poles unsafe. It will be remembered that negligence against the company was charged in two particulars: First that the company failed to properly inspect the pole from time to time, and thus it was allowed to become rotten and unsafe; and, second, that, some days before the pole fell, actual notice of the unsafe condition of the pole was brought home to the company, and, with this notice, the company neglected to make it safe. The portions of the charge to which exceptions were taken are as follows:

Inspection of Poles.

"The pole in question was unquestionably a good one when it was erected. It was large enough, and apparently strong enough. If it had broken down immediately, no negligence could be imputed either to the city or to the company on account of the fact. If it had been overthrown by a great storm, as sometimes happens, immediately after its erection, there would be no act of negligence imputable either to the

city or the electric light company in respect to it. But it was charged and alleged in the complaint that it was allowed to stand for such time that it became decayed and weak, and that it fell in consequence of such weakness. If this is a fact, and no measures were taken either by the city or the electric light company, to ascertain its condition, or if the measures were not effectual, if they were not such as should have been taken to ascertain the condition of the pole, then the liability exists in the same manner. * * * The defect which existed in it, if there was such defect, being rotten at the surface of the ground or below the ground, was one which was not open to ordinary observation. If there was a shell which was not decayed, it would be necessary to penetrate the shell in order to ascertain the condition of the heart of the pole. Whether anyone on behalf of the city or on behalf of the company made any such examination, within a reasonable time, as was needful to ascertain its condition, is a question for your consideration. In putting up the poles in the street, it was undoubtedly a duty resting upon the city, and upon the company which erected them, to examine them from time to time, as often as may be necessary, to ascertain their condition. Decay in timber is natural. We all know what it is. We know it from the ordinary experience of our lives, and it is a circumstance of which all parties concerned in these matters are bound to take notice. They are required to know that timber will decay, and are required to make such examination and inspection from time to time as will determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use. If you are of opinion that the examinations, either of the electric company or by the city, were of a kind and character such as ought to have been made to ascertain the condition of the pole, and were, in fact, made by them, and that the defect in the pole, if any there was, was not discovered by such examination, then the city cannot be liable in this action. The only liability of the city with respect to the poles erected in this manner, when it was apparently safe

on the outside when it was first put up, was to inspect from time to time to ascertain whether it had fallen into a condition which rendered it unsafe."

In the latter part of the charge the jury was instructed that, unless there was negligence on part of the company, it would not be liable; that negligence would consist in a failure to inspect and examine the pole with sufficient care and diligence. And in the first part of the charge it was declared to be the duty of the company to take effectual measures to ascertain the condition of the pole; that the company was required to know that timber will decay, and was required to make such examination and inspection, from time to time, "as will determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use." It may be true, as is claimed on behalf of the defendant in error, that the court did not intend to impose upon the company a duty beyond that of exercising ordinary care in the maintenance of the poles forming part of its electric light plant; but the question is whether the jury would not naturally construe these instructions to mean that the company was bound to make such an examination and inspection from time to time as would determine and ascertain whether decay had in fact taken place. Giving the language used its natural import, it certainly does impose upon the company the duty of making such examination, from time to time, as will ascertain and determine whether the poles have become decayed; and it is then declared that a failure to make such an examination constitutes negligence on part of the company. The evidence in this case showed that the decay which affected the strength of the pole was not upon the surface, and therefore was not open to ordinary observation, and, applying the instructions given to the facts proven, the jury could only understand from the instructions given that the company was bound to make such an examination of the poles as would be effectual to discover decay existing underneath the surface.

In defining the liability of the city, the court charged the jury that if "the examination, either of the electric company or by the city, were of a kind and character such as ought to have been made to ascertain the condition of the pole, and were in fact made by them, and that the defect in the pole, if any there was, was not discovered by such examination, then the city cannot be liable in this action." No such instruction was given with reference to the electric company, and there seems no escape from the conclusion that the charge was faulty and misleading, in that it failed to properly define the duty resting upon the company with respect to the maintenance of the poles by it lawfully placed in the city streets, in that it was so phrased that the jury must have understood that the company was bound to make such an examination that all defects would certainly be discovered, instead of being bound to use reasonable and ordinary care in the supervision and inspection of the poles placed in the street. By this ruling it is not meant to relieve the company from a faithful performance of its obligations to the public. In all cases wherein telegraph, telephone, electric light and power and electric car companies obtain and exercise the privilege of erecting and maintaining poles, wires, lamps, and other appliances in the public streets, they are bound to know that the maintenance of such appliances in and about the highway may create dangers to persons exercising the primary and paramount right of passage along or across the same. The companies are not insurers of the safety of the public against all dangers arising from the lawful placing in the street of the appliances pertaining to the business carried on by the companies; but they are bound to know the dangers which may naturally be caused by such use of the streets, and to guard against the same by the exercise of all the foresight and caution which can be reasonably expected of prudent men under such circumstances. If the court, in its instructions, had not over stepped this line in defining the obligation resting upon the electric company, we would not feel compelled to hold that error had been committed; but,

as we view it, the court used language which the jury might well construe to mean that practically the company was bound to make such an examination of its appliances as would certainly secure a discovery of all hidden defects therein, which extends the duty resting upon the company beyond the limit which the law imposes upon the company.

It is also assigned as error that the court charged the jury that if Blake, who was an employee of the company, made an examination of the pole, and discovered its rotten and unsafe condition, this would be notice to the company, whether he communicated this knowledge to any officer of the company or not. Blake was called as a witness for the defendant in error, and he testified that he was in the employ of the electric company as a lamp trimmer, it being his duty to trim the lamps, report the "outs," put in carbons, and to report anything that looked bad,—to report any trouble. He further testified that, some 10 or 15 days before the pole fell which injured Miss Sherret, he examined the pole with a screwdriver, and found "that the screwdriver went in pretty easy, and showed that it [the pole] was pretty rotten," and that he was led to make this examination from seeing the pole "wriggling." He further testified that he notified Mr. Sheridan, a storekeeper of the company, of the fact he had discovered. Mr. Sheridan, being called as a witness, denied receiving such report or notice from Blake. Mr. McSparrin, the line foreman of the electric company, and Mr. Barker, the superintendent, both testified that it was Blake's duty to report any defects he discovered either to the foreman or the superintendent, and both witnesses denied receiving any report of the defect in the pole from him. The court instructed the jury that, if they found from the evidence that Blake did in fact examine the pole and discover the unsafe condition thereof at the time he stated in his testimony, this would be notice to the company, regardless of the question whether he made a report thereof to any other employee or officer of the company, and this ruling is assigned as error.

Same—Knowledge of Employee—Notice to Master.

In Thompson on the Law of Corporations (volume 4, § 5195) the rule is stated to be to the effect that, in order to bind the principal, the notice must be communicated to one whose duty it is "to act for the principal upon the subject of the notice, or whose duty it is to communicate the information either to the principal or to the agent whose duty it was to act for him with regard to it." Counsel for the electric company, in the brief submitted, state their view of the rule in the following terms: "The general rule with reference to the question of notice is that notice to the agent is notice to the principal, if the agent comes to a knowledge of the facts while he is acting for the principal; but this rule is limited by the further rules that notice to the agent, to bind the principal, must be within the scope of the employment,"— and cite in support thereof the cases of The Distilled Spirits, 11 Wall. 356, and Rogers *v.* Palmer, 102 U. S. 263. In the former case it was said that "the general rule that a principal is bound by the knowledge of his agent is based on the principle of law that it is the agent's duty to communicate the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty"; and in the latter case it was held that knowledge obtained by an attorney when conducting a case for a client was imputable to the latter.

As already stated, Blake testified that it was his duty to report anything wrong or any trouble he discovered about the poles or wires of the company; and none of the witnesses for the electric company deny this fact, but, on the contrary, McSparrin and Baker, the line foreman and superintendent, both testify that it was Blake's duty to report to them any defects he might discover; and thus it was made plain that it was Blake's duty to take notice of defects in the plant coming under his observation, and to report the same when discovered; and therefore, within the doctrine of the authorities cited, the court was justified in instructing the jury that knowledge acquired by Blake of the defective condition of the pole, when he was going his rounds as an employee of

the company, would be imputable to the company, because it was proven beyond dispute that it was his duty to take notice of defects, and, noticing them, to make report thereof.

A number of errors are assigned upon the action of the court in permitting testimony to be given with respect to the mental and physical condition of the defendant in error prior to the accident, and her condition after the injury; but we find no error therein, and it is not necessary to discuss them at length.

Exception is also taken to the ruling of the court upon the defense interposed of contributory negligence, which was to the effect that there was no evidence sustaining the defense. The charge of negligence on part of defendant in error was based upon the fact that, when she attempted to cross the street at the time of the accident, she did so diagonally, thus leaving the crossing usually followed by pedestrians; it being claimed that, had she been upon the crossing proper, she would not have been struck by the falling pole and wires. To maintain the defense of contributory negligence under these circumstances, it would be necessary to hold that the defendant in error had no legal right to cross the street diagonally, and that she was a trespasser in thus going upon it. In support of this contention, counsel for plaintiff in error cite a number of cases wherein it was held that it was a question for the jury to determine whether the party injured was negligent in the use made of the street or highway; but these are cases wherein a charge of negligence against the defendant corporation was a failure to keep the sidewalk in proper condition, in that some defect existed in the pathway itself, but it appeared that the usually traveled part of the street was in proper condition, and the injury had been occasioned by the traveler going outside of this part of the street. In this class of cases there is usually a choice given to the traveler to use the usually traveled and safe part of the highway, or to go upon the part which may be less safe; and then it is for the jury to say whether it was negligence to use the latter. In this

Contributory Negligence.

case, as the trial court stated to the jury, when defendant in error started to cross the street, there was nothing in the surroundings which would charge her with notice that she incurred greater danger in crossing diagonally, and therefore there was nothing on which to base the charge of contributory negligence other than the fact that she crossed diagonally; and certainly this would not sustain the charge of contributory negligence, unless it be true that pedestrians have no right to cross a public street except at right angles and at places ordinarily used as a crossing. The use of the public streets between crossings is not limited solely to animals and vehicles, but may be used by footmen, due caution being exercised. Elliott, Roads & S. 622; Moebus *v.* Herrmann, 108 N. Y. 349, 15 N. E. 415.

The only other error assigned which needs consideration is based upon that part of the charge upon the rule of damages which was given in the following words: "If she is under further disability, if these injuries are permanent in their character, so that she will not be able hereafter to resume her occupation, or, resuming it, cannot perform the service as efficiently as before, she is entitled to compensation in the degree in which she loses the power to earn money. So that, if you think that her powers are permanently impaired, that she will not hereafter be able to carry on her occupation as a school teacher, for the length of time for which she is withdrawn from her occupation she is entitled to such money as she could earn during that time, whether it be one year or more."

Damages—Instructions.

In effect, the jury were instructed that defendant in error was entitled to compensation for the past loss of time, resulting from the injury,—that is, to the compensation she would have earned as a school teacher; and, further, that, if the jury found that the injuries received would impair her ability to carry on her occupation as a school teacher in the future, she would be entitled to the salary she would have earned for the year or years she was disabled from pursuing her occupation. In cases wherein the evidence shows that

the injury received will affect the ability of the party in the future to earn money, compensation must be made therefore but the rule is not that the jury must determine the number of years that the disability will continue to exist, and then multiply this number by the yearly compensation the party has earned in the past. Damages for future losses in cases of this kind are not susceptible of computation by a strictly mathematical calculation. Evidence may be given of the age of the party injured, the probable duration of life, the effect the injury has had upon the ability of the person to earn money, of the probability that the injurious effect on the ability to earn money will continue in the future, either during life or for a lesser period, and of the business or occupation in which the person was engaged, and the compensation, whether by wages, fees, by a fixed salary or profits that resulted therefrom; and, from the facts thus proven in evidence, it is for the jury to award such fair sum as will, in their judgment, compensate the party for the decreased or destroyed ability to earn money in the future, due allowance being made for the contingencies and uncertainties that inhere in such matters. Railroad Co. *v.* Putman, 118 U. S. 545, 7 Sup. Ct. 1; Railway Co. *v.* Needham, 10 U. S. App. 339, 351, 3 C. C. A. 129, 148, and 52 Fed. 371, 378. We are of the opinion that the charge of the court on this subject is open to the criticism that the jury would naturally infer therefrom that they must compensate the defendant in error for this future loss by allowing her the yearly compensation she had earned as a teacher for the length of time they deemed the disability would continue, thus assuming that, if this accident had not happened, the defendant in error would certainly have continued to teach at that rate of salary for her lifetime, or for the length of time the jury determined the injury would continue to affect her ability to earn money; and, as already said, this is not a correct statement of the rule to be observed by the jury in estimating damages of this nature.

For these reasons, the judgments rendered must be reversed, and the case be remanded for a new trial as to both the city of Denver and the electric company.

THAYER, Circuit Judge (dissenting). I am not able to concur in all the propositions considered and decided in the foregoing opinion. If a city authorizes a telegraph, telephone, or electric light company to erect a tall wooden pole, burdened with wires, on one of its public thoroughfares, it is affected with knowledge, from the very nature of the structure, that, in course of time, it will decay, and become dangerous to those who have occasion to use its streets. I am of opinion, therefore, that a municipality which authorizes such poles to be erected on its streets is under an obligation to the public to see that they are examined in a proper manner and at reasonable intervals, either by its own agents or by the persons or corporations whom it has authorized to erect them, and that the duty of inspection does not rest exclusively upon the latter, as the opinion of the majority seems to hold. Moreover, I do not understand that the charge of the trial judge, when considered altogether, imposed upon the electric light company the duty of exercising more than ordinary care in the matter of inspecting its poles. From the fact that the jury were instructed very pointedly that there could be no recovery against either of the defendants unless negligence on their part was proven, it is apparent I think, that the trial judge did not entertain the view, or intend to convey the idea to the jury that the electric light company was bound at all hazards to see that its poles were in a safe condition. Considered as an entirety, the charge on this branch of the case meant, I think, that the electric light company was required to adopt a proper method of examining its poles,—one which would be liable to develop any interior rottenness,—and to examine them at any reasonable intervals. This direction, in my judgment, was substantially correct.

Notes

Falling Poles—Liability of City.—In Norristown *v.* Moyer, 67 Pa. St. 355, the plaintiff was injured by the falling of a pole in a street erected by the citizens some years before, the pole having become rotten. The court held that it was the duty of the town to have had the pole removed and it was liable for the injury whether the neglect was wilful or not. The court even went so far in this case as to hold that it was not necessary that the town should have had notice of the condition of the pole. And in Gilmartin *v.* Mayor, etc., of New York, 55 Barb. (N. Y.), 239, it appeared that a city employee, in attempting to take down a liberty pole in a public park which had become dangerous, did so so unskillfully that it was precipitated against a telegraph pole which was thereby broken off and cast against the plaintiff's daughter, causing her death. *Held*, that the defendants were liable although the employee had received no express orders to remove the pole from the officer having charge of the public parks.

Care Required of Electric-Light Companies.—An electric-light company is bound as to the public to exercise the utmost degree of care in the construction, inspection, repair, and operation of its apparatus and appliances. Haynes *v.* Raleigh Gas Co., 114 N. Car. 204, 41 Am. St. Rep. 786; Perham *v.* Portland Gen. Electric Co. (Oregon 1898), 53 Pac. Rep. 14; Snyder *v.* Wheeling Electrical Co., 43 W. Va. 661, 499.

Or the rule may be thus stated: To prevent an injury to the public, the law requires that usual and ordinary care should be used, which, in such a business as an electric-light company operates, requires and demands a degree of care and diligence proportionate to the danger or mischief that is liable to ensue. The words "usual and ordinary care" mean in such cases nothing more or less than that if there be great danger and hazard in the business, there should be a corresponding degree of skill and attention required by the law. Denver Consol. Electric Co. *v.* Simpson, 21 Colo. 371, 5 Am. Elec. Cas. 278; Cook *v.* Wilmington City Electric Co., 9 Houst. (Del.) 306. See also Dwyer *v.* Buffalo Gen. Electric Co., 20 N. Y. App. Div. 124.

McGar

v.

Borough of Bristol.

(*Supreme Court of Errors of Connecticut, March 30, 1899.*)

Evidence.—When parties to a cause affecting real estate request the trior to visit it for a personal inspection, its situation and state, as well as its surroundings, so far as they may be material to the issue, are as fully in evidence as if they had been presented to his consideration through descriptions given by witnesses under oath.

Change of Grade—"Special Damages."—Any direct damage resulting from changing a street grade, peculiar to plaintiff, are special, within the meaning of Gen. St. § 2703.

Same—Photographs as Evidence.—Where photographs of the premises are offered in evidence to picture to the court how the premises looked before and after the the change of grade, they are not inadmissible merely for want of the testimony of the photographer.

Change of Natural Grade—Right to Recover.*—In an action under such statute for damages for changing a street grade, the contention that by placing her house on the summit of a ridge which crossed the road, plaintiff was estopped from any recovery for a reduction of grade, the necessity of which she ought to have foreseen, is without merit.

Findings of Fact—Appeal—Review.—Findings of fact will not be reviewed on appeal.

Grade—Definition.—The term "grade" is used in such statute, not to signify a level precisely established, but the surface of the highway as it in fact exists, and the grade may be natural and undulating.

APPEAL by defendant from Hartford county court of common pleas. *Affirmed.*

Case Stated.

The finding stated these facts: The plaintiff in 1894 owned a lot on the corner of Prospect and Henry streets, in the defendant borough, on which were one house fronting on the former, and two fronting on the latter. The Prospect street house stood on a knoll, which was the end of a ridge over which Prospect street passed.

*See notes at end of case.

The well-settled grade of the street followed the natural contour of the land, which was undulating, but nowhere rose as high as the knoll. In 1894 the borough straightened and widened Prospect street by due proceedings under its charter, and benefits were assessed against the plaintiff on account thereof. No change in grade was then made, but in 1895 the grade of the street was changed, and without first establishing any grade in the manner provided by the borough charter. At this time the borough reduced the inequalities in the surface of the street, and cut off the top of the ridge, near the front of the plaintiff's house; this cut being about two feet deep at that point. Her sidewalk had been higher than the roadbed, from which steps led up to it, and another short flight of steps broke the slope from the sidewalk to the house. The borough lowered the sidewalk by more than five feet, to the new grade of the street. The house was so near the sidewalk that this made it necessary to construct a new flight of steps in the dooryard, and the effect of the changes was to depreciate the market value of the plaintiff's property, and give the place an unsightly appearance. The plaintiff asked the borough to take proceedings under its charter to assess damages and benefits on account of these changes, but it refused. She then paid the previous assessment against her, and brought this suit. During the trial, the court, at the request of both parties, viewed the premises, and at this time observed the condition of the streets. Two photographs of the house—one taken before and one after the change of grade—were introduced, with testimony as to their accuracy. That of the photographer was not introduced, to which the defendant excepted. The defendant claimed that the question to be passed upon, and which must determine the judgment of the court, was "the market value of the premises just before and just after the changes found, taking into account the damages suffered on account of the changes thereof, and that, in considering this, the changed condition

of the street, both in front of, and extending in either direction from, the plaintiff's premises, must be taken into account." The court accepted this as a correct statement of the law, "with the reservation that the bearing of the 'changed condition of the street,' at points other than in front of the plaintiff's premises, upon the question of benefits, is a matter dependent in every case upon the circumstances and conditions peculiar to it." Sundry exceptions were taken to the finding, and to the refusal to incorporate therein certain matters which the defendant claimed to be material and established facts.

John J. Jennings, for appellant.
Noble E. Pierce, for appellee.

BALDWIN, J. (after stating the facts). The plaintiff's right of action is purely statutory. Gen. St. § 2703. The damages recoverable for a change of grade in a highway include such as may result from any change in that of the sidewalks. These, when constructed on the highway, form a part of it; and it is within the discretion of the municipal authorities whether they shall or shall not be maintained on the level of the roadbed traveled by vehicles. To change their grade is to change in part that of the highway, although in other respects it may be left unaltered. Hillhouse *v.* City of New Haven, 62 Conn. 344, 26 Atl. 393.

Evidence.

An injury from changes of this character was alleged in the complaint, and is established by the finding. It is contended that it was found without evidence. The view of the premises taken by the court, in connection with the testimony as to their previous condition in respect to the means of access to the street, amply sustains it. When parties to a cause affecting real estate request the trior to visit it for a personal inspection, its situation and state, as well as its surroundings, so far as they may be material to the issue, are as fully in evidence as if they had been presented to his consideration through descriptions given by witnesses under oath.

McGar *v.* Borough of Bristol

The claim that the "special damages" for which the statute authorizes a recovery were not pleaded with sufficient particularity has no merits. Any direct damages, peculiar to the plaintiff, are special, within the meaning of the statute, and will support an action. Platt *v.* Town of Milford, 66 Conn. 320, 34 Atl. 82.

Change of Grade—"Special Damages."

The photographs of the premises were not inadmissible for want of the testimony of the photographer. The object for which they were offered was to picture to the court how the premises in question looked before and after the change of grade. Evidence that the representation was accurate could be supplied by any one competent to speak from personal observation. The plaintiff's husband testified that the photographs represented the house in question, and this was enough, if it convinced the court. The sufficient identification of a photograph is a preliminary question of fact to be decided by the trial judge. Its weight as evidence may depend largely upon extraneous circumstances.

Same—Photographs as Evidence.

The borough claims that, by placing her house on the summit of a ridge which crossed the road, the plaintiff was estopped from any recovery for a reduction of grade, the necessity of which she ought to have foreseen. This point of view is countenanced by the common law, but the statute applies wherever damage has been done, without regard to whether the alterations which caused it could have been reasonably anticipated. Fellowes *v.* City of New Haven, 44 Conn. 240, 257.

Change of Natural Grade—Right to Recover.

The evidence certified for our consideration under the exceptions to the finding is sufficient to support every fact found which is material to the judgment. Some of these facts were inferred from other facts, or from the personal observation of the court when viewing the premises, but in no instance where the inference was not a legitimate one. Others, as to which there was conflicting testimony, were found against that of the greater number of witnesses, but it is settled by repeated

Findings of Fact—Appeal—Review.

decisions of this court that such conclusions will not be reviewed on appeal. Thresher *v.* Dyer, 69 Conn. 404, 37 Atl. 979.

Grade—Definition.

Particular complaint is made that there was no evidence that the original grade of the street was "well settled," whereas the surface was so uneven as to constitute no grade at all. The description of its character given by these words is quite immaterial. The term "grade" is used in the statute, not to signify a level precisely established by mathematical points and lines, but the surface of the highway as it in fact exists. Any elevation or depression of this surface by the municipal authorities, resulting from an attempt to establish a grade, is a change of grade, which, if damages result, will support an action. There is no error. The other judges concurred.

NOTES.

Change of Street Grade by Municipality—Liability for Damage.—See generally Ehrsam *v.* City of Utica (N. Y., 1899), *ante*, 70, and extensive *note*, 73 *et seq.*

Where Grade Same as Natural Grade.—New York.—The *New York* law applies to a change of grade which was the same as the natural surface of the land. McCall *v.* Saratoga Springs, 56 Hun (N. Y.) 639.

Pennsylvania.—In *Pennsylvania*, a purchaser of land abutting on a street where some work has been done towards altering the natural grade, but no specific grade has been fixed by the town, may recover damages for further changes made after his purchase. New Brighton *v.* Peirsol, 107 Pa. St. 280.

WILLSON *et al.*

v.

BOISE CITY.

(*Supreme Court of Idaho, Jan. 5, 1899.*)

Diversion of Stream—Overflows—Liability of City.*—The waters of a natural stream flowed through the city, crossing 10 streets therein, and during high water flooded the streets, injuring them, to

*See notes at end of case.

the damage of the city. To avoid such injury, the city constructed an artificial canal, and diverted the waters of said stream therein. The canal was not of size sufficient to convey the waters of said stream, and overflowed, and injured plaintiff's lands. *Held*, that the city was liable to plaintiff in damages, it being beneficially interested in the change of the course of a natural stream, and negligent in not constructing the canal of a size sufficient to carry the waters of said stream at all times, and in quantities that might be reasonably anticipated.

Powers.—A grant of power carries with it authority to do those things necessary to the exercise of the power granted.

Rights of Abutter.—One who purchases land, and improves the same, on the line of an artificial water way constructed by a municipal corporation, may well rely upon such municipal corporation to perform the duty that it is under of keeping such artificial water way in repair and condition to carry all of the waters that may flow therein from usual and ordinary causes, and may recover damages received by the negligent flooding of his lands by waters from such artificial water way.

(Syllabus by the Court.)

APPEAL by defendant from Ada county district court. *Affirmed.*

Action by plaintiffs to recover damages caused by flooding their lands by waters from an artificial canal constructed by the defendant. Judgment for plaintiffs for $500 and costs of action. A motion for a new trial was denied.

Case Stated.

Defendant appeals from the order denying a new trial, and from the judgment. On the trial, the following stipulation of facts was made, which constitutes the evidence in the cause, to wit: "The above-named parties hereby agree upon the following statement of facts, and submit the same to the court for the determination of the points in controversy: The facts agreed upon, in addition to the facts admitted in the pleadings, are as follows: That Cottonwood creek is a stream tributary to Boise river, and rises in a range of mountains that extends along the northerly side of Boise City. That the natural channel of said stream enters said limits of Boise City, and runs Southwesterly through the limits of Boise City, a distance of more than one mile. That the said natural channel of said stream through the

limits of Boise City was, before moving the same, varying feet in width and in depth. That, at times of high water in said stream, and of freshets, at the time said stream ran through said city limits in its natural channel, said waters ran at times outside, and over said natural channel, and upon the land adjoining said natural channel, and the natural channel was at said times of high water insufficient to carry the waters of said stream. When the same ran through Boise City, it crossed ten streets. That, during the low-water season of each year, the authorities of Boise City could have, by making artificial channels along the streets, controlled the waters of said stream, so as not to have been an obstruction to said streets, or to have interfered with or prevented the proper cleaning or repairing thereof, but could not, during the seasons of high water, have prevented such water obstructing the streets crossed by said stream, or of its interfering or preventing the proper cleaning and repair thereof. That, in high-water seasons, the fact of the water flowing out of the regular channel and over the adjacent lands would tend to cause sickness amongst the inhabitants of said Boise City. That, during the high-water seasons of said Cottonwood creek, which occurred only in the springs of 1892, 1894, and 1897, since the construction of said flume, the same being caused by freshets, storms, and warm winds melting the snow in the mountains at the head of said stream, said waters overflowed the walls, cut the banks of said flume out, and flowed upon the adjacent lands. That the mayor and common council of Boise City, for the purpose of preventing and allowing said stream from running in its natural channel through the limits of Boise City, did, in the year 1891, change the course of said stream from its natural course, and forced it to flow in an artificial channel, easterly from the city limits of Boise City, and outside of said city limits of the defendant. That, in said year 1891, the mayor and common council of Boise City did, by contract, cause to be constructed said artificial channel or flume herein, out of rock, cement, and lime, and extending from

the point where said Cottonwood creek enters Boise valley, outside of said limits of the defendant, from the range of mountains along and without the city limits of Boise City, to the said Boise river. That said artificial water way or flume runs between the westerly line of said real estate of plaintiffs and the easterly boundary line of said Boise City. That said artificial channel or flume was constructed in manner as follows: That the materials out of which said flume is made are pieces of rock, varying in width and thickness from six inches to four feet, and lined inside in places with lime and cement. That the size of said flume is five feet in height, three feet in width at the bottom, and the walls have a slant of forty-five degrees, making about eight feet distant across from top wall to wall. That the walls of said flume are two feet in thickness, banked up on the outside with gravel and earth, said banks being about three to six feet in thickness. That the average grade of said flume, from where said waters leave the mountains at the mouth of said flume, to Boise river, is above thirty feet. That the average depth of water which runs through said flume, except the high-water seasons of 1892, 1894, and 1897, is about two and a half to three feet. That the mayor and common council of Boise City at the time of the construction of said flume, and subsequent to said time, have built permanent stone dams,—one about five hundred feet from the head of said flume, and also one near the head or mouth of said flume,—for the purpose of retaining and preventing the sand and gravel from flowing into said flume from said Cottonwood creek. That, ever since the construction of said flume, the same has been used for the purpose of carrying the waters of said Cottonwood creek, where the same leaves said mountains, to Boise river, and that the same has been cared for and maintained by the mayor and common council. That in the month of May, 1897, there came on a high stage of water in Cottonwood creek, which was caused by freshets, winds, and storms, and filled up said flume and water way with a large volume of

water, thereby overflowing the same. That said premises of plaintiffs are situate about two hundred feet from the nearest point where said waters overflowed said flume during said month of May, 1897. That said waters, after overflowing said flume, ran in and upon the premises of plaintiffs, and deposited thereon sand and gravel, and undermined the said wall on the southerly side thereof, and broke and weakened said wall, and washed away some of the soil of said premises, and injured the house situate thereon, to plaintiffs' damage $500.00. That said mayor and common council of Boise City have, ever since the construction of said artificial channel or flume, in the spring months of each year, entered into contract with private persons to clean out, repair, and place in good condition said flume. That the amounts spent by the mayor and common council of Boise City upon said flume, in order to keep the same in good condition, were from $400.00 to $500.00 each year. That said defendant does not derive any revenue in its corporate capacity from said flume. That, at the time that the waters of said Cottonwood creek, to wit, in the month of May, 1897, flooded over said flume, and ran in and upon the premises of said plaintiffs, the mayor and common council of the defendant did employ about fifteen men to assist the street commissioner of Boise City in preventing the waters from flooding out of said flume. At said time, the street commissioner of said defendant and his assistants, to wit, about fifteen men, went to said flume aforesaid, with shovels, other tools, and sacks of sand, placing said sacks of sand along the top of said walls of said flume, and worked until said waters ceased overflowing said flume, and running upon the premises of said plaintiffs. That, subsequent to the construction of said artificial channel or flume of Cottonwood creek by said mayor and common council of Boise City, to wit, in the year 1891, said plaintiffs purchased said premises herein referred to, and had constructed thereon said wall and dwelling house mentioned in said second amended complaint herein, and that said plaintiffs knew of the existence, course, and condition of said flume or artificial channel

at the time of purchasing and constructing said house and wall. That no legal proceedings have, prior to this suit, been brought by said plaintiffs, or any one in their behalf, to compel the removal of said flume, or to abate it, nor has any one given the defendant notice to abate or remove said artificial channel or flume aforesaid."

C. C. Cavanah, for appellant.

Hawley & Puckett, for respondents.

QUARLES, J. (after stating the facts). It is contended by the counsel for the defendant, who is the appellant here, that the action of the mayor and common council in constructing the artificial channel or flume in question is *ultra vires*. That said mayor and common council had no authority to go outside of the city limits to construct such flume. That in doing so they were not performing a duty, but rendering a beneficial service to the state, and must be regarded as the agents, not of the defendant, but of the state. Section 5 of the charter of Boise City provides what powers may be exercised by the mayor and common council, "within Boise City," and grants, among numerous other powers, the power to secure the protection of persons and property therein; to provide for the health, cleanliness, ornament, peace, and good order of the city; to remove nuisances; to provide for the prevention and removal of all obstructions from the streets, cross walks, and sidewalks, and for cleaning and repairing the same. To remove a nuisance from the city, it sometimes happens that its officers or agents, or some one for it, must necessarily go outside of the city limits. To protect the health of the city, it becomes necessary to construct sewers, running through the city, and emptying at some point outside of and lower down than the city. The power to provide for the health and cleanliness of the city grants power to the mayor and common council to cause sewers to be constructed to carry the waste from and outside of the city, and authorizes the mayor and common council to cause such sewers to be con-

Powers.

structed to such points outside of the city as may be necessary in order to rid the city entirely of said waste. In order to protect the streets of said city, to protect the property and the health of its citizens, it appears from the record in this case that it was necessary to construct the artificial channel in question. A grant of power carries with it authority to do those things necessary to the exercise of the power granted. The mayor and common council, in constructing said channel, were exercising a power conferred upon them by said city charter. Now, having acted within the scope of the powers granted by the city charter, the defendant must take care of the said artificial channel, and of the waters which naturally flow in Cottonwood creek, whether during the summer and fall seasons, when such waters are at a low stage, or during the spring thaws, when the said stream is naturally swollen from melting snows in the mountains. As a part of the common history of the country, we know that more snow falls some seasons than falls others, and that there is more water in said creek during the spring thaws in some years than there is in other years. The record before us shows that during the freshets, or spring thaws, during some of the years since its construction, said artificial channel, on account of its not being large enough, did not and could not carry all of the waters of said stream, causing the flooding of adjacent lands. Of course, the city has no control over the elements, and is not responsible for loss occasioned by the act of God, or by the acts of the common enemy; yet, having constructed such artificial channel, and having diverted said stream from its natural channel, it is under a legal obligation to take care of said artificial channel, and of the waters that naturally flow in said stream, at all seasons. If the damage complained of had occurred through and by means of a cloud-burst, or unusual and unprecedented storm, the defendant, not being in fault, would not be responsible. But the injury complained of was caused by said artificial channel being too small to carry the waters of said stream during the spring high waters, and which

water was the natural result of usual and ordinary causes, and the defendant is responsible, because it is the fault of said defendant that said artificial channel is not large enough.

Diversion of Stream—Overflows—Liability of City.

The authorities agree that a city is not responsible for the acts of its police and health officers. And the weight of authority is to the effect that, when a city or town is charged by statute with the duty of appointing certain officers, whose mission is to perform services beneficial to the public, and from whose services the municipality derives no profit, the municipality is not liable for the negligence of such officers. But that rule has no application here. There is no command in the defendant's charter directing it to change the natural course of Cottonwood creek. The changing of the channel of said stream was not for the benefit of the general public, but for the benefit of the defendant and its inhabitants. The municipality was directly benefited. By such change it was saved the expense and trouble of controlling the waters of said stream within the city limits, and it avoided the injury which naturally resulted from the overflowing and flooding of its streets in times of high water. By the express provisions of its charter, the control of its streets is vested in the mayor and common council. Now, to exercise this power, to protect said streets from the injury caused them by flooding, and to save expense to the municipality, the mayor and common council caused said artificial channel to be constructed. In doing this, they were performing a duty, acting within the scope of their powers, and not merely performing a voluntary service to the general public. It is not consonant with reason for the rules of law to say that, if a stream runs through land owned by A., he can protect his property by constructing an artificial channel, and turning the waters of such stream upon his neighbors' land, to their injury, and not be liable to them. In the case at bar, the defendant, for its benefit, has done this thing. Having changed the channel of said stream, and caused the waters thereof to flow where they did not, and would not, flow by nature, it must keep such artificial chan-

nel in condition to carry the waters diverted by it, in high as well as low water seasons, and protect the property of residents upon and near such artificial channel, or respond in damages to the parties injured. If the acts of the mayor and common council which caused the injury complained of consisted in attempting to confine the waters of said stream to the natural channel thereof, to save the property of adjacent owners, and its streets, it would not, of course, be responsible. In the case at bar, if the waters of said stream had not been diverted from their natural course, the plaintiffs' property would not have been injured, but the waters which injured their property would have injured the inhabitants of Boise City, and its streets. It is contrary to natural justice to say, as to the injury complained of, which was caused by the defendant, for its financial benefit, to protect its streets and save it expense, that the plaintiffs, innocent parties, must suffer their loss in silence, and the defendant, though the gainer, is under no obligation to compensate plaintiffs for their loss. The rule applicable to this case is correctly given by JUDGE COOLEY in his work on Torts (1st Ed.), at page 586, where, after giving the rule applicable between private persons, he says : "All the foregoing principles are as much applicable to municipal corporations, in their dealings with water courses, as to individuals. Thus, if a town shall so erect a bridge as that the natural and probable consequence shall be to raise the water on the lands above, by the partial obstruction interposed to its flow, the town will be liable, as an individual would for a like obstruction." And, at page 621, he says : "But municipal corporations are resposible for due care in the execution of any work ordered by them, and, if the work is one for the special benefit of its own people, it must not negligently be allowed to get out of repair, to the injury of individuals." And, in a note on the same page, the author says : "Thus, a city is liable if one of its drains or sewers is suffered to become obstructed, whereby the lands of individuals are flooded." And, at page 625, the learned author says : "It is a princi-

ple of nearly universal acceptation in this country, when a town is incorporated, and is given control over the streets and walks within its corporate limits, and is empowered to provide the means to make and repair them, that the corporation not only assumes this duty, but by implication agrees to perform it, for the benefit and protection of all who may have occasion to make use of these public easements ; and that, for any failure in the discharge of this duty, the corporation is responsible to the party injured." In the case at bar, the charter of the defendant, with the amendments thereto, at the times mentioned in the stipulation of facts, gave the defendant control over its streets, and empowered it to provide means to make, repair, and protect them, and to move obstructions from them. To do so it was necessary to construct the artificial channel in question. The defendant assumed this duty. By assuming this duty, and by accepting the power granted by the charter, under which it acted, its liability to construct and keep the artificial channel in question of such capacity that it would carry the waters of Cottonwood creek, without damage to the owners of property in its vicinity, is implied. See Shear. & R. Neg. (4th Ed.) §§ 255, 281 ; New York & B. Saw Mill & Lumber Co. *v.* City of Brooklyn, 71 N. Y. 580. In Anthony *v.* Inhabitants of Adams, 1 Metc. (Mass.) 284, the court says: "We can have no doubt that an action upon the case will lie against municipal corporations, when such corporations are in the execution of powers conferred on them, or in the performance of duties required of them by law, and their officers, servants, and agents, shall perform their acts so carelessly, unskillfully, or improperly as to cause damage to others." In Welsh *v.* Village of Rutland, 56 Vt. 228, the court recognizes the rule that a municipality is responsible for the negligent exercise of powers granted, and cites the following instances: The construction and maintenance of waterworks, of ditches or drains, of bridges or culverts, and structures which obstruct the flow of natural water courses, and of public works,—and then adds:

"If a plan adopted for public works must necessarily cause injury or peril to private persons or property, though executed with due care and skill, the law regards the execution of such a plan as negligence." In Maxmilian *v.* Mayor, etc., of City of New York, 62 N. Y. 160, the plaintiff's ancestor was killed by being negligently run over by an ambulance wagon driven by an employee of the commissioners of public charities, and the court held that the city was not the principal of the employee of the commissioners. The decision rested upon two grounds,—one, that the relation of principal and agent did not exist between the defendant city and the ambulance driver, the other ground being that the defendant, in its corporate capacity, received no benefit whatever from the service rendered by the commissioners of public charities. The case is, so far as both the grounds named are concerned, unlike the case at bar, and that the decision is not applicable as authority here. The weight of authority is to the effect that, when a duty devolves upon a municipality which is ministerial in its nature, the municipality is liable for injuries received through a negligent discharge of such duty, or through failure to perform such duty. In Dill. Mun. Corp. (4th Ed.) § 1048, it is said: "It is agreed that, wherever the duty as respects drains and sewers ceases to be legislative or judicial or *quasi* judicial, and becomes ministerial, then, although there be no statute giving the action, a municipal corporation is liable, to the same extent and on the same principles as a private person or corporation would be under like circumstances, for the neglect or the negligent omission to discharge such duty, resulting in an injury to others." And, in a foot-note to said section, the learned author illustrates the distinction between a judicial and ministerial act in the following language: "A corporation may be said to act judicially in selecting and adopting a plan on which a public work shall be constructed; yet, as soon as it begins to carry out that plan, it acts ministerially, and is bound to see that the work is done in a reasonably safe and skillful manner." Dill. Mun. Corp. §§ 980

–983, 1048. In the case before us, a condition confronted the defendant city. Its streets were being overflowed and damaged by the waters of a natural stream flowing through its boundaries. The presence of said natural stream obstructed its streets at times, endangered the health of its inhabitants, and was a source of expense and annoyance. To meet this condition, and avoid its consequent evils, the mayor and common council, in fact, the municipality itself, decided to change the course of said natural stream, by building an artificial channel sufficient to carry the waters of said stream therein. Thus far the act was *quasi* judicial. But, when it came to carrying out this plan, the acts were ministerial. It became the duty of the defendant to construct said artificial channel of sufficient permanency, strength, and size to carry all of the waters of said stream, and for its failure to discharge this duty it is responsible to any one injured by such failure. Perry *v.* City of Worcester, 6 Gray, 544; Powers *v.* City of Council Bluffs, 50 Iowa,197; Spangler *v.* San Francisco, 84 Cal. 12, 23 Pac. 1091; Mayor, etc., *v.* Bailey, 2 Denio, 433. See notes to Chapman *v.* City of Rochester, (N. Y. App.) 1 Lawy. Rep. Ann. 296 (s. c. 18 N. E. 88). In the opinion in that case, speaking of the pollution of a stream to the injury of plaintiff, caused by sewage conveyed to said stream by a sewer constructed by the defendant, the court say: "The filth of the city does not flow naturally to the lands of the plaintiff, as surface water finds its level, but is carried thither by artificial arrangements prepared by the city, and for which it is responsible." In the case at bar, the waters of Cottonwood creek do not flow naturally to the lands of the plaintiffs, but are "carried thither by artificial arrangements prepared by the city, and for which it is responsible."

It is urged by the appellant that the evidence is not sufficient to support the judgment. It is one of the facts stipulated that during the high-water seasons of 1892, 1894, and 1897 the artificial channel in question would not carry the waters of said stream, and the same was overflowed, and the

adjacent lands flooded. It is not agreed that during the springs of said years the flooding of said artificial channel was the result of any cause other than the natural and ordinary cause which came with the breaking up of winter and the introduction of spring, and there was no evidence offered by the defendant to show that the injury complained of resulted from any unusual cause which could not be reasonably anticipated. If the said injury was the result of unavoidable casualty, or the result of conditions which are unusual and could not be reasonably anticipated, the existence of such conditions would be a defense, but such defense should be pleaded and proven. We think the evidence sufficient to support the judgment. The natural and reasonable inference from the agreed statement of facts is that the artificial channel in question is not large enough to carry the waters of Cottonwood creek during the spring seasons. This fact was demonstrated the next spring following its construction, showing that it was negligently made too small. Having actual notice that said artificial channel was not large enough to carry the waters diverted by the defendant, soon after its construction, the defendant has negligently omitted to enlarge the same, and, now that innocent parties have suffered, seeks to avoid liability, principally on the ground that the action of the mayor and common council in constructing said artificial channel and diverting said stream, being outside of the city, is *ultra vires*. But it is urged that the plaintiffs, having bought the land in question after the construction of said artificial channel, are estopped from recovering by such notice. We do not think so. The plaintiffs were justified in relying upon the defendant to perform its duty by taking care of the waters which it had diverted from a natural stream.

Rights of Abutter.

It was the duty of the defendant to protect all of the property along the line of said artificial channel, not only for the benefit of the person who owned such property at the time of the construction of such artificial channel, but also for the benefit of their suc-

cessors in interest. In the case of Arave *v.* Canal Co., 46 Pac. 1024, this court, speaking through MR. JUSTICE HUSTON, said: "Appellants' contention that the plaintiff was guilty of contributory negligence in erecting his house and other improvements, when they were liable to be damaged by the canal of the defendant, subsequently constructed, is not maintainable. * * * The maxim, 'So use your own property as not to injure the rights of another,' applies as well to corporations as to individuals. Appellants' claim that the corporation defendant is not called upon to consider or inspect the rights of settlers along the line of its canal, who have made such settlement subsequent to the location of the canal, is not only unsupported by law, but is repugnant to every principle of equity and good conscience." The material facts set forth in the stipulation of the parties were pleaded in the amended complaint. The defendant filed a general demurrer to said amended complaint, which demurrer was overruled by the district court, properly, we think, as said amended complaint states a cause of action. Counsel for appellant has spent much time in research, and made a strong and able argument for the city, but it does not convince us that the judgment appealed from was erroneous. Judgment affirmed, with costs to the respondents.

HUSTON, C. J., and SULLIVAN, J., concur.

NOTES.

Liability of Municipality for Injuries Caused by Defective Drains and Sewers.—See generally *note*, *ante* 77 *et seq.*

Diversion of Watercourse.—In McClure *v.* Red Wing, 28 Minn. 186, it was held that if a city deems it necessary to obstruct the flow of a natural watercourse and to divert the water therefrom into a sewer, the construction of such sewer is a ministerial duty, and the city is liable for damages caused by its failure to make the sewer of sufficient size to carry off the water.

Ordinary Floods.—A municipality is bound to construct its waterways of sufficient capacity to carry off ordinary floods. Evansville *v.* Decker, 84 Ind. 325, 43 Am. Rep. 86; Powers *v.* Council Bluffs, 50

Notes

Iowa 197; German Theological School *v.* Dubuque, 64 Iowa 736, 2 Am. & Eng. Corp. Cas. 625; Damour *v.* Lyons, 44 Iowa 276.

What Floods Must be Provided for.—In City of Madison *v.* Ross (3 Indiana, 236), it was held that the corporate authorities of the city were not liable where they had caused to be erected a culvert which had proven sufficient to resist the ordinary flow of water for three years, but had failed to carry off an extraordinary flood which ordinarily careful men and engineers of usual skill would not have supposed likely to occur. To the same general effect is Sprague *v.* City of Worcester (13 Gray, 193), where it was held that an action of tort would not lie against a city for obstructing a stream to the injury of a mill, by the erection of a bridge, if the bridge is suitably constructed, so as to let the water pass with reasonable freedom, at all times, except in cases of extraordinary freshets not occurring annually.

But in Mayor of New York *v.* Bailey (2 Denio, 433), CHANCELLOR WALWORTH seems inclined to hold the municipal authorities to a stricter accountability. It was there held that where a dam was constructed across a stream, it was not enough that it should be sufficient to resist ordinary floods. If the stream is occasionally subject to great freshets, those must likewise be guarded against. But see Mayor of Cumberland *v.* Willison, 50 Md. 138; Smith *v.* Mayor of N. Y., 66 N. Y. 295; Allen *v.* Chippewa Falls, 52 Wis. 430, 38 Am. Rep. 748; McClure *v.* Red Wing, 28 Minn. 186.

Generally, as to insufficient or defective watercourses or culverts, see Wheeler *v.* Worcester, 10 Allen, 591; Groton *v.* Haines, 36 N. H. 388; Haynes *v.* Burlington, 38 Vt. 350; Gilman *v.* Laconia, 55 N. H. 130; Mayor *v.* Thompson, 29 Ark. 569; Stack *v.* East St. Louis, 85 Ill. 377; Mootry *v.* Danbury, 45 Conn. 550; Parker *v.* Lowell, 11 Gray, 353; Perry *v.* Worcester, 6 Gray, 544; Sprague *v.* Worcester, 13 Gray, 193; Lawrence *v.* Fairhaven, 5 Gray, 110; Talbot *v.* Whipple, 7 Gray, 122; Rochester Lead Co. *v.* Rochester, 3 Comst. 463; Mills *v.* Brooklyn, 32 N. Y. 489; Gould *v.* Booth, 66 N. Y. 62; Smith *v.* Mayor, 66 N. Y. 295; Kobs *v.* Minneapolis, 22 Minn. 159; Powers *v.* Council Bluffs, 50 Iowa, 197; Ross *v.* Madison, 1 Ind. 281, 3 Ind. 236; Dayton *v.* Pease, 4 Ohio St. 80; Mayor *v.* Randolph, 4 W. & S. (Pa.) 514; Roll *v.* Indianapolis, 52 Ind. 547; Thurston *v.* St. Joseph, 57 Me. 519.

Extraordinary Floods.—A municipality is not bound to construct its waterways of sufficient capacity to carry off unusual or extraordinary floods. Los Angeles Cemetery Assoc. *v.* Los Angeles, 103 Cal. 461; Hession *v.* Wilmington, (Del. 1893) 27 Atl. Rep. 830; Harrigan *v.* Wilmington, 8 Houst. (Del.) 140; District of Columbia *v.* Gray, 1 App. Cas. (D. C.) 500; Madison *v.* Ross, 3 Ind. 236; German

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Theological School *v.* Dubuque, 64 Iowa 736, 2 Am. & Eng. Corp. Cas. 625; Wright *v.* Wilmington, 92 N. Car. 156, 15 Am. & Eng. Corp. Cas. 284; Fairlawn Coal Co. *v.* Scranton, 148 Pa. St. 231; Fair *v.* Philadelphia, 88 Pa. St. 309, 32 Am. Rep. 455; Collins *v.* Philadelphia, 93 Pa. St. 272; Allen *v.* Chippewa Falls, 52 Wis. 430, 38 Am. Rep. 748; Parker *v.* Des Moines, 53 Iowa 679.

WAKELEY

v.

CITY OF OMAHA *et al.*

(*Supreme Court of Nebraska, March 8, 1899.*)

Board of Equalization—Notice of Sitting.—Notice of the sitting of the city council as a board of equalization, under section 20, c. 13, p. 121, Sess. Laws 1889, by publication for at least six days prior thereto, is an indispensable prerequisite to legal action.

Validity of Special Assessment—Estoppel.—The mere fact that an owner of adjacent property signs a petition for paving a street in a prescribed manner does not furnish grounds for the presumption that the petitioner assents to irregular or void proceedings of the city council in the performance of such duties as may devolve upon it after the payment shall be completed.

Voluntary Payments—Validation.—A void special assessment is not validated by the mere fact that payments thereon have been voluntarily made.

(Syllabus by the Court.)

APPEAL by plaintiff from Douglas county district court. *Reversed.*

E. Wakeley and *A. C. Wakeley*, for appellant.

W. J. Connell, *Lee S. Estelle*, and *E. H. Scott*, for appellees.

RYAN, C. Appellant was denied relief in the district court of Douglas county, wherein she sought a perpetual injunc-

*See notes at end of case.

tion against the collection of a special assessment upon lots 5 and 6 in block 12, Drake's addition to the city of Omaha. One side of lot 5 faces upon the paved street with respect to which the assessment was made, and the opposite side of lot 5 forms the line of separation between lots 5 and 6. At the time the equalization of assessment was made upon these lots, section 21, c. 13, p. 121, Sess. Laws 1889, was in force, and among its provisions were the following: "The city clerk shall complete the assessment roll for the city on or before the second Monday of October in each year; * * * and when such roll is completed, the council shall hold a session of not less than five days as a board of equalization, giving notice of said sitting for at least six days prior thereto, in three daily papers of the city; * * * and in all cases before any special taxes that may be levied, except for constructing wood side walks, shall be finally levied, it shall be the duty of the council to sit as a board of equalization, for the purpose of equalizing any such proposed levy of special taxes or assessments, and correcting any error therein, giving notice of such sitting in the same manner as above provided in this section; * * * and thereupon such assessments and special taxes shall be finally made." It was proved on the trial that preceding the assessment and levy under consideration there was but one publication in one daily paper in the city of Omaha, two publications in another, and that, probably, there was not a third paper of daily issue in the city. The city council, had therefore, no jurisdiction to make the adjustment, levy, and assessment attempted. McGavock *v.* City of Omaha, 40 Neb. 64, 58 N. W. 543; Bellevue Imp. Co. *v.* Village of Bellevue, 39 Neb. 876, 58 N. W. 446; Smith *v.* City of Omaha, 49 Neb. 883, 69 N. W. 402; Ives *v.* Irey, 51 Neb. 136, 70 N. W. 961; Hutchinson *v.* Same, 52 Neb. 345, 72 N. W. 218; Leavitt *v.* Bell, 55 Neb.—, 75 N. W. 524; Medland *v.* Connell, 56 Neb.—, 77 N. W. 437.

Case Stated.

Board of Equalization—Notice of Sitting.

It is, however, urged that appellant should not be heard

to allege the above-noted lack of jurisdiction, because of certain of her own acts. These were, first, that she signed the petition for the paving of the street. But this signing was before the pavement was put down, and could have had no reference, to a waiver of compliance with statutory requirements regulating the proceedings whereby the levy and assessment were to be made, after final completion of the work. The other fact upon which appellee relies is that appellant paid without protest three of the ten annual installments into which the assessment was divided. The brief of appellee comments thus upon this branch of the case: "The plaintiff knew that this tax was a lien on her property; that it amounted in law to a judgment against herself and property. She proceeded to discharge the lien, to pay that which amounted to a judgment, and all this with the certain knowledge of the steps necessary to be taken by the city council; and yet no complaint for five years." If this statement of the principle involved is correct, the analogy is destructive of appellee's argument. If a judgment had been rendered against Mrs. Wakeley in a case wherein she had never been served with summons, and had never appeared, would the mere fact that, subsequent to the date of the so-called judgment, she made one or more payments, estop her to deny the validity of the judgment, when, by process of law, it was attempted to collect the balance? and, if so, on what principle could the estoppel be founded? As to the payments actually made, she might, under some circumstances, be denied affirmative relief; but why should she be held concluded against asserting the invalidity of the balance of the judgment when payment thereof is sought to be coerced? The partial payments which prevent the running of the statute of limitations are treated as acknowledgments of the continued validity of that which at one time was concededly valid, but that is no argument for treating as valid that which was always void. The case at bar is not strengthened by this illustration, which we think very apt. The payments were

Validity of Special Assessment—Estoppel.

Voluntary Payments—Validation.

purely voluntary, and no fact has been pleaded or proved which suspends appellant's right at any time to discontinue her generosity. The judgment of the district court is reversed, and the cause is remanded, with instructions to enter a decree as to lots 5 and 6, aforesaid, in conformity with the prayer of appellant's petition. Reversed and remanded.

NOTES.

Special Assessment Proceedings—Compliance with Statutory Requirements.—In special assessment proceedings there must be a strict compliance with statutory provisions made for the protection of the property owner. Lyon *v.* Alley, 130 U. S. 177; French *v.* Edwards, 13 Wall. (U. S.) 506; Himmelmann *v.* McCreery, 51 Cal. 562; Taylor *v.* Donner, 31 Cal. 480; Hewes *v.* Rice, 40 Cal. 255; Stockton *v.* Whitmore, 50 Cal. 554; Beveridge *v.* Livingstone, 54 Cal. 54; Brady *v.* Bartlett, 56 Cal. 350; Keese *v.* Denver, 10 Colo. 113; Kyle *v.* Malin, 8 Ind. 34; Delphi *v.* Evans, 36 Ind. 90; Nevens, etc., Tp. Draining Co. *v.* Alkire, 36 Ind. 189; Ayer *v.* Lake, 11 Ill. App. 566; People *v.* Starne, 35 Ill. 121; Hager *v.* Burlington, 42 Iowa 661; Wahlgreen *v.* Kansas City, 42 Kan. 243; Covington *v.* Casey, 3 Bush (Ky.) 698; Caldwell *v.* Rupert, 10 Bush (Ky.) 179; Steckert *v.* East Saginaw, 22 Mich. 10; Warren *v.* Grand Haven, 30 Mich. 24; Grand Rapids *v.* Blakely, 40 Mich. 367; Whitney *v.* Hudson, 69 Mich. 189; Jones *v.* Boston, 104 Mass. 461; McComb *v.* Bell, 2 Minn. 295; Flint *v.* Webb. 25 Minn. 93; Petition of Astor, 50 N. Y. 363; Matter of Cameron, 50 N. Y. 502; Petition of Sharp, 56 N. Y. 257; Sharp *v.* Speir, 4 Hill. (N. Y.) 76; Hopkins *v.* Mason, 42 How. Pr. (N. Y. Supreme Ct.) 115; People *v.* Utica, 7 Abb. N. Cas. (N. Y. Supreme Ct.) 414; Knell *v.* Buffalo, 54 Hun (N. Y.) 80; Matter of Blodgett, 91 N. Y. 117; Moore *v.* Albany, 98 N. Y. 405; Matter of Pennie, 108 N. Y. 364; Danville *v.* Shelton, 76 Va. 325; Norfolk *v.* Chamberlain, 89 Va. 196; Massing *v.* Ames, 37 Wis. 645; Pound *v.* Chippewa County, 43 Wis. 63; Hall *v.* Chippewa Falls, 47 Wis. 267; Flewellin *v.* Proetzel, 80 Tex. 191; State *v.* Jersey City, 42 N. J. L. 575; Robinson *v.* Logan, 31 Ohio St. 466.

Same—Notice to Property Owners.—It is essential to the validity of special assessment proceedings that the property owner should be given such notice thereof as to afford him an opportunity to be heard, where the exercise of judgment is necessary in estimating the proper amount. State *v.* Plainfield, 38 N. J. L. 95; State *v.* Elizabeth, 40 N. J. L. 278; State *v.* Road Com'rs, 41 N. J. L. 83;

Brewster *v.* Newark, 11 N. J. Eq. 114; Grace *v.* Board of Health, 135 Mass. 490; Power's Appeal, 29 Mich. 504; Paul *v.* Detroit, 32 Mich. 108; Thomas *v.* Gain, 35 Mich. 155; Williams *v.* Detroit, 2 Mich. 560; Brown *v.* Denver, 7 Colo. 305; Gilmore *v.* Hentig, 33 Kan. 156; Jordan *v.* Hyatt, 3 Barb. (N. Y.) 275; Miller *v.* Graham, 17 Ohio St. 1; Baltimore, etc., R. Co. *v.* Wagner, 43 Ohio St. 75; Gatch *v.* Des Moines, 63 Iowa 718; Lyman *v.* Plummer, 75 Iowa 353; Ford *v.* North Des Moines (Iowa, 1890), 45 N. W. Rep. 1031; Strowbridge *v.* Portland, 8 Oregon 467; Scott *v.* Toledo, 36 Fed. Rep. 385; Murdock *v.* Cincinnati, 39 Fed. Rep. 891; Paulsen *v.* Portland, 149 U. S. 38.

Special Assessments—Validity—Estoppel.—If the proceedings are void under which a special assessment for municipal improvements is made, the property owner is not estopped to contest the validity of the assessment by the facts that he petitioned for the improvement, and failed to object while the work was in progress. Coggeshall *v.* Des Moines, 78 Iowa 235; McLauren *v.* Grand Forks, 6 Dakota 397; Gillett *v.* McLaughlin, 69 Mich. 547; Galbreath *v.* Newton, 30 Mo. App. 380; Kansas City *v.* Ratekin, 30 Mo. App. 416; Rector *v.* Board of Improvements, 50 Ark. 116; Quinn *v.* Paterson, 27 N. J. L. 35; Petition of Sharp, 56 N. Y. 257.

Same—Recovery Back.—And where an invalid, but apparently valid, special assessment has been paid by one ignorant of its invalidity, the amount so paid may be recovered. Smith *v.* Jersey City, 52 N. J. L. 186, 20 Am. Rep. 386; Jersey City *v.* O'Callaghan, 41 N. J. L. 349; Campion *v.* Elizabeth, 41 N. J. L. 355; Elizabeth *v.* Hill, 39 N. J. L. 555; Schultze *v.* New York, 103 N. Y. 307; Vaughn *v.* Port Chester, 135 N. Y. 460; Horn *v.* New Lots, 83 N. Y. 100, 38 Am. Rep. 402; Bruecher *v.* Port Chester, 101 N. Y. 240.

THORNTON *et al.*

v.

CITY OF CLINTON.

(*Supreme Court of Missouri, Feb. 21, 1899.*)

Local Assessments—Special Tax Bills—Duty to Collect.—Even if plaintiffs were entitled to the reassessments for street improvement work done by them, it was not the duty of the defendant city, under the law of the contract, to collect the assessments, it having dis-

charged its whole duty when it had made the assessments, and issued the tax bills in payment.

Disproportionate Assessments—Validity—Construction of Statute.*—Under a statute providing that a street improvement "assessment shall be make for each block separately, on all lots and pieces of ground on either side of such street or avenue the distance improved, * * * in proportion to the front foot," private property on one side of a street cannot, by a contract between the city and the contractors, be made liable to assessment for the cost of improving the other side, where non-assessable county property is situated.

APPEAL by plaintiffs from Henry county circuit court. *Affirmed.*

In this suit plaintiffs seek to recover of defendant, which is a city of the third class, a general judgment for a balance due them on contracts for macadamizing, curbing, and guttering certain streets which bound the courthouse square in that city. The contracts were entered into in December, 1888, and the work was completed in August, 1889. Upon the completion of the work, the defendant city passed ordinances making special assessments against the abutting property to pay for the same, and issued to the plaintiffs special tax bills against the various lots and pieces of land fronting on the streets so improved, and included in the land so assessed, and against which special tax bills issued, the court-house square, which is the property of Henry county. These ordinances, making the assessments and directing the issuance of the special tax bills, purported to thus provide for payment of the work in pursuance of the contracts, and authorized the plaintiffs to collect the bills by action in the name of the city to the use of plaintiffs. All of these special tax bills were paid to plaintiffs, except those against the court-house square, which the county refused to pay. Plaintiffs, in the name of the city of Clinton, to their use, brought suit against the county on these special tax bills, to enforce them against the court-house square. The cause came to this court on appeal, and it was here decided that

Case Stated.

*See State (Frevert *et al.*, Prosecutors) *v.* Mayor, etc., of City of Bayonne, *ante* 299, and *note*, 305.

property owned by the county for that purpose was not subject to the special assessments, and the tax bills were not chargeable against it. City of Clinton *v.* Henry Co., 115 Mo. 557, 22 S. W. 494. That decision was rendered in this court May 8, 1893. On June 30th following, plaintiffs petitioned the mayor and common council to make a reassessment, and to make such assessment for each block separately on all lots or pieces of ground on either side of the streets bounding the public square, except the public square itself. On September 5th, next the mayor and council not having taken the action requested, plaintiffs filed a petition in this court, stating their case, substantially as above, and praying a writ of *mandamus* to compel the mayor and council to make the reassessment as they (plaintiffs) had prayed in their petition above mentioned of June 30th ; that is, assessing the whole contract cost of the improvements against the private property, exempting from the burden the public square. Upon filing this petition, an alternate writ of *mandamus* issued upon order of the chief justice in chambers. This alternative writ being served, the mayor and common council yielded obedience to it, and made the reassessment as required, and, upon their return showing such obedience, the suit ended with a judgment against them for costs. In complying with the exigencies of that writ the common council passed ordinances November 7, 1893, in due form, making the reassessments, and issued special tax bills, delivered to the plaintiffs for the whole contract price of the work, crediting upon the tax bill against each lot the amount that the owner had paid on the former assessment and tax bill, so that the balance for which this reassessment was made, and new tax bills issued, was the sum of the former assessments and tax bills against the public square, and amount to $8,022.32 of principal, which money has never been paid. In none of the ordinances passed was any provision made for the collection of the assessments, except declaring them a lien on the lots respectively named in the several assessments and tax bills, and authorizing plaintiffs to collect them by action in the

name of the city to their use. When the first set of tax bills was issued to plaintiffs, they presented them for payment to the owners of the lots, respectively, and the same were paid and surrendered to the lot owners, with payment in full indorsed on them, and certificate of such payment to the city clerk, who thereafter entered satisfaction of the liens on the register of liens, which the ordinance required to be kept, and gave certificates accordingly. After this, and before the reassessment in November, 1893, there were numerous sales of lots embraced in the reassessment. These sales were by warranty deeds, and the parties had at the time no notice of any unsatisfied claim for improvements. These last special tax bills have never been paid, and before the commencement of this suit the plaintiffs tendered them back to the mayor and common council, and demanded of them payment of the balance of the unpaid contract price.

Upon the trial, the original contracts under which the work was done were not produced, having been lost, but what purported to be copies were in evidence, offered by plaintiffs. There was testimony on the part of defendant tending to show that in each of the original contracts there was a clause in these words: "In no event is the city to be held liable for any sum whatever for work done under this contract." There was also testimony on the same part tending to show that the question of the liability of the county, or the power to tax the court-house square, was discussed between the contractors and the city officials before the contracts were finally signed, and that the contractors took legal advice on the subject, and became satisfied that the county was liable, and public square subject to the assessment, and agreed to take the risk involved in that question, and to look to the private property on the other side of the street for its half only of the improvement, and that this fact became of public notice, and was the cause of no remonstrance on the part of the property owners being filed, as might have been done under the ordinance, and the project defeated. But none of that testimony was weighed or entered into the finding of the

trial court sitting as a jury. That court, before deciding the case, sustained plaintiffs' objection, and excluded that evidence. The written opinion of the learned judge who tried the case shows that in his mind it did not turn on those questions of fact, but on his construction of the statutes relating to the powers of the common council to bind the city by contract. The ordinance under which the city moved in the matter is shaped under the provisions of section 31 of the act of March 30, 1887, relating to cities of the third class, and directs assessments for payment of the work as in that act required, and, in addition, requires the special tax bills shall issue to the contractors on the assessments, which should be a lien on the property covered, and, as a penalty, if not paid within 30 days of presentment and demand, should bear interest at 10 per cent. per annum, and, if not paid in 60 days, might be collected in an action in the name of the city to the use of the contractors. The contracts in question conformed to the requirements of the ordinance, and provided that, upon the completion of the work, "the city of Clinton, Missouri, party of the first part, hereby agrees to levy by ordinance a special tax upon the lots, blocks, and pieces of ground upon the side or sides of the street or streets, avenues, alley, or square along and upon which the improvements may have been made, for the amount due the contractor on said contract, apportioning such amount among the several lots, blocks, or pieces of ground liable thereto according to the front foot abutting on each of the streets above described, in accordance with ordinance made and provided, charging each lot and piece of ground with its proper and lawful share of the amount due on said contract, which tax bills shall be issued under the seal of the city, in accordance with the ordinance made and provided in such cases, and shall be countersigned by the mayor, and delivered to the said Hulsey & Thornton, contractors, upon the completion of each street, in full payment for the work done." The finding and judgment were for the defendant in the circuit court, from which, after ineffectual motion for new trial,

plaintiffs filed their bill of exceptions, and bring the case here for review.

Peak & Ball and *J. D. Lindsay*, for appellants.

John I. Hinkle, *Calvird & Lewis*, *Casey & Owen*, *James Parks & Son*, and *Jas. H. Lay*, for respondent.

VALLIANT, J. (after stating the facts). 1. After the defendant city, in November, 1893, in obedience to the alternative writ of *mandamus*, passed the ordinance making the reassessment, and issued the new set of special tax bills, the Kansas City court of appeals decided, in the case of Oster *v.* Jefferson City, 57 Mo. App. 485, that under the act of 1887 a city of the third class had no authority to issue special tax bills for work of this kind, but that it was its duty to make the assessments, and collect them itself, and pay them over to the contractor, and that, if it failed to do so, it was a breach of duty, for which the city was liable to the contractor in a general judgment for the amount due him. Plaintiffs bottom this suit on the doctrine announced in that case. It does not answer the plaintiffs' proposition to say that the statute points out the manner in which the city may be bound by contract, and limits its liability under a contract, to such as is made in conformity to the statute, and to the extent and in the manner therein specified. The point in the plaintiffs' complaint here is, not that the defendant has failed to pay a debt or discharge a liability which it incurred directly *ex contractu*, but that the relation between the plaintiffs and the city, growing out of a contract which the city had the power to make, is such as that the law imposes on the city a duty to use its powers to collect a debt that is due the plaintiffs, not from the city, but from a source from which the city alone can obtain the money. It is not strictly an action *ex contractu*, nor yet strictly an action on a tort, but it would be classed under the common-law pleading as trespass on the case. It is damages for the neglect of an alleged duty, not specified in the contract, but which, as plaintiffs insist, is imposed by law on the defendant in con-

sequence of its relation to the subject-matter of the contract. This is a totally different proposition from that relating to the liability of a municipal corporation for neglect of a public duty as a *quasi* government. If the law is, as the learned counsel think it is, that the city had no authority to issue tax bills, but that is was the duty of the city, when the work was done, to assess and collect the taxes itself for the benefit of the plaintiffs, and it neglected and failed to do so, to the plaintiffs' damage, then the city is liable in a general judgment for the amount plaintiffs lost by the neglect of that duty, unless the plaintiffs are barred by limitations or otherwise precluded. The case of Fisher *v.* City of St. Louis, 44 Mo. 482, is not authority for the proposition above laid down, because, under the facts of that case, the city had the power to contract, on its own general account, to do the work there required,—that is, to abate a nuisance,—and it did not have the right to tax the cost of the work against the adjacent property. Nor is Kiley *v.* City of St. Joseph, 67 Mo. 491, regarded as in conflict with this proposition. The court there, speaking by HOUGH, J., said: "The concluding paragraph of the petition would seem to indicate that this suit was originally prosecuted upon the theory that the work done was properly chargeable to the adjacent property, and that by reason of the failure of the officers of the city to assess the cost of said work the plaintiff's lien therefor on said property was lost, and the city thereby became liable for the value of said work. That view, however, has not been presented in argument here. The plaintiff now contends that the city had authority to order the work to be done under its general power to improve the streets of the city, and that, as neither the ordinance requiring the work to be done nor the contract under which it was done specified that it was to be paid for in tax bills, said work constituted a claim against the city, and was not chargeable to the adjoining property." The court then addressed itself to that view of the case, and the opinion must be construed in that connection. What is said about compelling the officer to

perform his duty was on a point really not in controversy. But Steffen *v.* City of St. Louis, 135 Mo. 44, 36 S. W. 31, is authority in support of that proposition, and many of the cases cited in the brief of plaintiffs' counsel from other states support it, and we think it is supported, also, by reason and justice.

2. But what was the duty of the city in June, July, and August, 1889, as the work was being furnished under these contracts? The ordinance authorized by section 31 of the act of March 30, 1887, upon which the whole of this improvement scheme was founded, provided, not only for the assessments, but also for the issuance of tax bills, declaring them liens, providing for their registration, and authorizing the contractors to collect them by action in the name of the city to their use. The plaintiffs are chargeable with notice of this ordinance, because the statute makes it a condition precedent to the authority of the common council to enter upon such a contract, and a party dealing with the common council is bound to inquire if it is following the law. And, besides, the ordinance is referred to in the contract itself. It was provided in the contracts that, on the completion of the work called for, the city should make its assessments, and issue the tax bills "in full payment for the work done." It is clear that both parties to the contract understood, and acted on the idea, that when the assessments were made, and the tax bills issued, the city had done all that it was bound to do. This understanding continued, even after the adverse decision to plaintiffs in their suit against Henry county, and after the *mandamus* suit, and after they had by that means forced the city to issue said tax bills in November, 1893, and until the decision of the Kansas City court of appeals in Oster *v.* Jefferson City, *supra*. Then, for the first time, the plaintiffs advanced the idea that it was the duty of the city to collect the tax, and that its failure to do so rendered it liable. Thus we see that by the literal terms of the contract the city was required to issue the tax bills to plaintiffs, in

Local Assessments—Special Tax Bills—Duty to Collect.

the form prescribed by the ordinance, "in full payment of the work done," and the ordinance therein referred to provided that, if the bills were not paid, plaintiffs were to sue on them in the name of the city to their own use. Even if the plaintiffs had a right to have the tax collected in a different way, they having agreed with defendant to do it in that way, and defendant complying with the contract, it is difficult to see how plaintiffs could rightly complain. The act of March 30, 1887 (Sess. Acts 1887, p. 64), was the law in force at the time the contracts in question were made. Section 31 of that act directs how the assessment shall be made; that is, the proportion each piece of property is to bear. Then section 32 provides that the assessments "shall be known as special assessments for improvements, and shall be levied and collected as a special tax, and shall be paid in the manner provided by ordinance, and said special tax may bear interest after thirty days from the date of issue and presentation at the rate of ten per cent. per annum." This section does not in so many words say that special tax bills shall issue, but some of its terms are meaningless unless we understand that tax bills are intended. Special tax bills to contractors for work of this kind were at the time nothing new in our law, but were familiar in our statutes and decisions. Even another section of the same act (section 73) provides for the issuance of special tax bills. Therefore, when the statute says "said special tax may bear interest after thirty days from the date of issue and presentation," it can refer to nothing else than the issue and presentation of the tax bill. The issuance of a tax bill in such a case was assumed as a matter of course. Then what does this language in the same section mean: "The assessment * * * shall be levied and collected as a special tax, and shall be paid in the manner provided by ordinance." The words are not used with technical accuracy. The idea is to declare the assessment a special tax, to distinguish it from a general tax, and the rest of the sentence means nothing, unless it means that the manner of collection is to be provided

by ordinance. That is the construction that the parties to this suit manifestly put on it, and that is the true construction. The ordinance passed in pursuance of the statute did provide the manner in which the special taxes were to be collected, and the plaintiffs acquiesced in it, and brought suit as therein provided against Henry county on the tax bills issued to them under these coutracts. Under the act of 1887 there was no manner for collecting the tax prescribed, but it was left to the city to provide the method by ordinance. But the act of May 18, 1889, in section 1, provides that such tax bills shall be collectible by action in the name of the city to the use of the holder thereof. That act passed with an emergency clause, and went into effect May 18, 1889, and was therefore in effect when the first assessments of the special taxes were made, and when the first tax bills were issued to plaintiffs, in June, 1889. That section of the act of 1889, being purely remedial, governed the method of collecting the special tax. In point of fact, the mode of collecting the tax prescribed by that act, was the same as that prescribed by the ordinance; but, if it had been a different mode, it would have governed, since it affected, not the right, but the remedy only. Section 31 of the act of 1887 was carried forward into the Revised Statutes of 1889, where it was amended by expressly providing for the issuance of a special tax bill. Therefore, even if the issuance of tax bills was not necessarily implied in section 31 of the act of 1887, as we hold it was, still, after the Revised Statutes of 1889 went into effect, that section, as amended and revised, controlled the remedy; and when the city officials, in obedience to the *mandamus*, in November, 1893, made a reassessment, they were bound to follow the law as it then was, and apply the remedy as then prescribed. We therefore hold that, even if the plaintiffs were entitled to the reassessment required by the *mandamus*, there was no duty on the defendant to collect the taxes for them, and that, when the defendant made the assessment and issued the tax bills, it discharged its whole duty and obligation.

3. We gather, from the opinion of the court and the briefs of the counsel as reported, that the trouble in the case of Oster *v.* Jefferson City, *supra*, began on account of the character of the tax bills issued to the contractor; two sets having been issued, and both returned as invalid, for reasons appearing on their face. The city failed to issue other tax bills in proper form, and the contractor was unable to collect from the property owners. According to that statement, the city was guilty of a literal breach of the contract in failing to issue tax bills. The court held the city liable under those circumstances, and in its opinion said that the city had no authority to issue tax bills, but that it was its duty to collect the tax, and pay it over to the contractor. If we correctly gather the facts of the case, we think the city was liable, under the circumstances; but the breach of duty for which it became liable was in failing to issue proper tax bills to the contractor, and thereby withholding from him his only means of collecting his debt. And if the breach of duty occurred, so as to give the plaintiff in that case a right of action against the city before the passage of the act of 1889, then the court rightly held that the act of 1889 did not govern the case. But in the case at bar the city of Clinton was guilty of no such breach of duty. Tax bills were issued according to contract, and all of them collected by the plaintiffs, except those against the court-house square; and, when it was ascertained that those were invalid, others were issued, as required by the plaintiffs, so that, if the plaintiffs had a right to collect the balance of their bills from the private property, the city had placed in their hands the bills upon which demand could be made and suits maintained. But even if, as plaintiffs now contend, on the authority of Oster *v.* Jefferson City, *supra*, a city of the third class in such case had no right to issue tax bills, but was under the duty to collect the tax, still the defendant in this case is not liable if the proportion of the tax that was in the first instance assessed against the public square was not assessable against the lots owned by private

citizens. The city is not liable for failing to collect a tax which it could not in law collect. Unless, therefore, the balance of the contract price of plaintiffs' work yet unpaid is or was assessable against the property of the individuals, the defendant has done the plaintiffs no wrong even under plaintiffs' view of the law.

Disproportionate Assessments—Validity—Construction of Statute.

Did the plaintiffs and defendant have a right to make a contract between themselves that would render the property of citizens on one side of the street liable to assessment for the cost of improving the whole street? It is no answer to this question to say that the contract was made in good faith and faithfully performed by the contractor, that his debt is due, and that somebody ought to pay it. Nor does it satisfy the question to say that, unless these lots are chargeable with it, the debt must go unpaid. The owners of these lots were not parties to that contract, the proceeding as to them is in *invitum*, and their property is not affected, unless it is brought within the strict meaning of the statute. The conduct of both parties showed that neither understood, at the time of making the contract, that the abutting property on one side of the street was to bear the whole burden. The ground upon which these special assessments have been upheld is that they pay for the benefit the improvement confers. "Upon no other ground will such partial taxation for a moment stand." Neenan *v.* Smith, 50 Mo. 525; Farrar *v.* City of St. Louis, 80 Mo. 379. "Taxation, whether general or special, must be uniform, and must be distributed among those who are to pay it by a just ratio of apportionment. * * * One rule cannot be applied for one owner, and a different rule for another owner." City of Independence *v.* Gates, 110 Mo. 376, 19 S. W. 728; Dill. Mun. Corp. (4th Ed.) § 761. Bearing these principles in mind, and remembering, also, that this statute is in the nature of an invasion of private property, and to be strictly construed, it seems unreasonable to say that, as applied to the facts of this case, it means that the property on one side of the street, in one block, must pay,

not only for the benefit it receives from the improvement, and for the benefit which the property in another block on the other side of the street receives, but also to pay twice as much per foot for the same work that the property on the next block pays. There is neither equality nor uniformity in such result. Some of the older charters, which we find in looking up this subject, required the assessments to be made on each lot in the proportion of its front feet to the aggregate of the front feet of all the lots on both sides of the street for the whole distance of the improvement. And under these statutes the court has held that the assessment could not be made by blocks. Weber *v.* Schergens, 59 Mo. 389, and other cases there cited. But the present statute has expressly changed that. The language of the statute (Rev. St. § 1495) is: "The assessment shall be made for each block separately, on all lots and pieces of ground on either side of such street or avenue the distance improved, * * * in proportion to the front foot." So that now the law in express terms requires each block to bear its own burden. The lots that are owned by private individuals, on which it is sought to impose this extra burden, are in blocks separated by a street from the block owned by the county. It is evident that the lawmakers, in wording this statute, either thought that the county property would be bound as other property, or, as is more probable, overlooked that point entirely, and made no provision for it. But it is most unlikely that the law would have been left as it is, without any express provision to that effect, if the legislature had intended to impose so unjust and unequal a burden on a few.

It is unjust that the county or city should have the benefit of plaintiffs' work without paying for it; but it would also be unjust to lift the burden from their shoulders, and place it on those of a few individuals, who are under no legal obligation to bear it, and who are under no more moral obligation in that respect than the other inhabitants of the county. This is said in deference to the earnest appeal of the learned counsel to the court for an application of the maxim, "*Ubi jus*,

ibi remedium," to the conditions of this case. The right there referred to is a legal right, for the impairment of which some one is responsible. In the high moral sense in which it is invoked by the counsel, that maxim expresses rather the ideal of our aspirations than the result of our experience. As long as courts are only human, there will be many hardships for which there will be no remedy found. The judgment of the circuit court is affirmed.

SHERWOOD, BURGESS, BRACE, and ROBINSON, JJ., concur. GANTT, C. J., and MARSHALL, J., not sitting.

CITY-ITEM CO-OPERATIVE PRINTING CO.

v.

CITY OF NEW ORLEANS *et al.*

(*Supreme Court of Louisiana, March 7, 1899.*)

Municipal Acts—Legality—Action by Taxpayers.*—The taxpayer of a municipal corporation has a standing in court to sustain averments of illegality of a corporate act.

Tax Assessments—Revision.—The power delegated to assessing boards to revise assesssments, or to reduce them, is limited as to time each year. Assessments and the revision of assessments are closed after the 20th of March each year, subject to such changes in value of property assessed as the courts may decree. After the assessment has passed out of the hands of the assessing and revising officers, they have no further power, as relates to the value of the property carried on the rolls.

Same—Same.—The assessment of property, as to value, is the same for the municipality as for the state, and a decree, as relates to the latter, fixes it, also, as a basis of taxation for the former; and when revision and reduction is made as to one, it carries with it the assessment of the other at the same value.

Ultra Vires—Rights of Taxpayers.—If a tax payer has a standing in court in opposition to an act *ultra vires*, no compromise can be made to put an end to his right of action, as relates to the act attacked.

(Syllabus by the Court.)

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*See State *ex rel. v.* City of New Orleans *et al.* (La., 1898), *ante*, p. 122, and extensive *note*, p. 142 *et seq.*

City-Item Co-Op. Printing Co. *v.* City of New Orleans

APPEAL by defendants from parish of Orleans civil district court. *Affirmed.*

Walter B. Sommerville, Asst. City Atty., for appellants city of New Orleans, mayor, comptroller, and treasurer.

Denegre, Blair & Denegre, for appellant Crescent City R. Co.

E. A. O'Sullivan, for appellee.

BREAUX, J. This suit was brought by plaintiff, a taxpayer, to annul and set aside two ordinances of the municipal council, as having been adoped in violation of the charter of the city, and in contravention of the constitution and laws of the state. An injunction was issued in accordance with the prayer of plaintiff's petition.

Case Stated.

The following is a brief history leading to the compromise assailed:

The Crescent City Railroad Company, after having made application to the board of assessors and to the revision committee for reduction of its assessment, filed suit in the civil district court, and obtained writs of injunction against the board of assessors for the reduction of the assessments of its franchise for the years 1894, 1895, 1896, and 1897. Three of the suits were consolidated and decided by the court of the first instance. The fourth, for reduction of assessment for 1897, is still undecided in the civil district court. The consolidated suits, on appeal for reduction of assessments for the years 1894, 1895, and 1896, have been decided by the supreme court partly in favor of the Crescent City Railroad Company. 25 South. 311. With reference to another company named in the compromise assailed, the New Orleans City & Lake Railroad Company, the city of New Orleans had been in suit with it since 1889, and the city had finally obtained a judgment against it (the New Orleans City Lake Railroad Company), ordering it to comply with obligations by paving and planking along the line of its road. Early in 1898 the officers of the city became apprehensive and uneasy about the city's claim against this rail-

way, and about the city's claim against the Crescent City Railway Company for the taxes it owed the city. Regarding the former, the New Orleans City & Lake Railroad Company, the testimony disclosed that the planking ordered by the court's decree was no longer desirable, and that part of the way had been paved with other material, and, besides, it seems that the board of health had advised, on sanitary grounds, against the use of planks for paving. The city attorney had advised the chief executive officer of the city that, in his judgment, it would be impossible to execute the judgment of the supreme court of the United States on the paving contract against the New Orleans City & Lake Railroad Company. Instead of specific performance under the judgment of the United States supreme court, the judgment debtor, the New Orleans City & Lake Railroad Company, at first offered $10,000, which the city declined to accept. Subsequently this company offered $45,000. Regarding the latter (the Crescent City Railway), the supreme court had granted a rehearing. If the city gained the suit, it was thought that even then further litigation and delays might arise. The city authorities then gave a hearing to terms of compromise which resulted in a compromise between the city and the companies. The mayor of the city, after an agreement had been arrived at, was authorized by the council to settle the litigation between the city of New Orleans and the Crescent City Railway Company upon payment, within 30 days from the date of the publication of the ordinance granting the authority, of the amounts due for taxes by the Crescent City Railroad, and the $45,000 offered by the New Orleans City & Lake Railway, as a compromise. The amounts assessed by the assessors were the following: 1894: Franchise, $649,650; tax, $12,993. 1895: Franchise, $1,408,050; tax, $28,161. 1896: Franchise, $1,215,267; tax, $24,305.34. 1897: Franchise, $1,156,300; tax, $23,126, 1898: Franchise, $575,000; tax, $11,500. From the foregoing we can see that the compromise entered into covered the taxes of four years,

but the consolidated suits decided cover the taxes of three years, 1894, 1895, and 1896. This compromise between the city and the Crescent City Railroad Company was not to be carried out unless the New Orleans City & Lake Railroad paid to the city the $45,000 before stated, less credits for sums previously advanced to the city by the New Orleans City & Lake Railroad on account of the judgment it owed to the city. We are informed that the two companies, the Crescent City Railroad Company and the New Orleans City & Lake Railroad Company, were about to be controlled by one corporation or board, and that, in consequence, the two companies were embraced within one act of compromise covered by one ordinance.

Plaintiff's grounds of attack are, chiefly, that the municipal council is without authority to adjust and settle suits; that the compromise was in effect a proposed donation to the Crescent City Railroad Company; and that the city council has no right to remit interest due on taxes, or postpone payments. A judgment was rendered by the judge of the district court, perpetuating the injunction, and declaring illegal Ordinances 14,658 and 14,703, as in contravention of the constitution and laws of the state, and in violation of the city charter. From that judgment the city of New Orleans and the Crescent City Railroad Company have appealed.

The foregoing is a sufficient statement of the facts for the purpose of the decision. The right of plaintiff as a taxpayer to stand in judgment was questioned by defendants, in oral argument at bar and in the brief, on the grounds, chiefly, that it had no interest involved, as it had paid its taxes, and could have no concern about those who, like the Crescent City Railway Company, had been delinquent, and had effected a compromise, and thereunder a settlement, of their taxes. The right of a taxpayer of a municipal corporation to bring suit to test the validity of acts relating to taxation has been recognized by the courts, and the fact that he has paid his taxes does not make

Municipal Acts—Legality—Action by Taxpayer.

less his right to stand in judgment. Handy *v.* City of New Orleans, 30 La. Ann. 109, 1 South. 593, is a leading case upon the subject, citing Crampton *v.* Zabriskie, 101 U. S. 601, from which we quote: "The action is regarded as having a public character, and as being a proceeding in which the public complains." Under these and other decisions, the right of a resident taxpayer to sue, in order to prevent an illegal distribution of the money of a municipality, cannot be denied. Although the creditors of the city may have been provided for as to their claims, as stated in argument, yet there remains an interest enough in the taxpayer to enable him to oppose any illegal release of any one indebted to the treasury. The larger the amount in the treasury to the credit of its different funds, the less the liability of the taxpayer. The suit is in the nature of a public proceeding to test the validity of a corporate act.

We pass to the question of the power of the municipal council to compromise with a delinquent taxpayer, and release him from payment of part, or all, of his taxes, while a suit for a reduction of his assessment is pending before the courts. It is well settled that corporations have such powers as are given to them. There are special laws applying in manner of taxation. The constitution specially prohibits the general assembly—and, it follows, subordinate municipal corporations—from releasing or extinguishing any tax indebtedness to the state, or due to any of its municipalities. It devolves upon us to determine in the case before us for decision, whether the tax indebtedness here of the Crescent City Railway was within the scope of the prohibition. There had been a final assessment made. While the assessing authorities have the rolls in their possession in an incomplete state, they may reduce the assessment, but not after the assessment has passed from their hands. All taxpayers have the right to appear before the board of assessors of the parish of Orleans until the 20th day of March, and in other parishes until the 1st day of November, and be heard regarding overvaluation of property,

Tax Assessments—Revision.

but not after those dates. The question of value of the property assessed after the filing of the taxpayer's suit passes from the assessors and revising committee to the courts. The defendants urged that the assessment, as relates to those who appeal to the courts, is not complete; that, not being complete, a compromise may be made, as was made in the pending case. We have not found it possible to give our assent to that view. The suit brought does not have the effect of suspending the assessment. It is legal to the amount the court finds is the value of the property. Every person is taxed for the year, and the assessment dates from the day it was made, and not from the date of the final decision of the court pronouncing it legal as to value (for a part, or the whole) as carried on the roll.

We have just seen that the power of revision is limited by the statute as to time. After the date fixed by the statute is passed, in the absence of expressed delegation of power to the assessors and committee of revision, we must conclude that reduction of assessment is no longer possible, save by the decree of the court. In state and municipal taxation, the assessed value is the same. The same officer makes the assessment for both the state and the municipality, the same roll is used, and the same amount as to the value of each property assessed. "The valuation put upon property for the purpose of state taxation shall be taken as the proper valuation for purposes of local taxation in every subdivision of the state." Const. 1898, art. 203. It follows that no compromise can be made on the basis of property being of less value when the municipality is concerned than when the state is concerned.

Same—Same.

But, conceding, for the discussion that an agreement is possible regarding the value of property assessed, or the amount of taxation, the taxpayer still has an action to set aside a compromise, which action the compromise itself cannot put an end to and destroy. Even where, as in the case before us for decision, there was not the least intentional wrong, and all

Ultra Vires—Rights of Taxpayers.

that was done is marked by the utmost good faith and to promote the city's interest, yet the taxpayer of a municipal corporation may be heard who urges that the act of the municipal authorities relating to assessment and taxation is *ultra vires* and increases the weight of taxation. We have read with painstaking care the two elaborate briefs filed on behalf of the defendants. The burden of their complaint is grounded upon the principle laid down by many courts in other jurisdictions in support of the proposition that municipal corporations have the power to effect a compromise of claims in which they are concerned. The question covered by the last proposition does not arise in the case before us. We have naught to do with the city's right, ordinarily, to compromise claims. We do not, for that reason, pass upon that question. This, as we think, disposes (without the necessity of any further comment regarding them) of all the decisions cited by counsel regarding the compromise of claims other than those growing out of assessments or taxation. But revenue laws are *sui generis*, and particularly those applying in the case before us for decision. In order to create an interest in local government, and to guaranty every right, the state accords to each taxpayer the right and privilege of inquiring into the questions of assessment and taxation, in which all are concerned. It results that a compromise regarding taxes, as made in this case, cannot be made to operate as a hindrance to the assertion of that right. However absolute may be the power of a city council to compromise a claim, it cannot affect such a compromise, as relates to assessment, as will prevent inquiry into its legality by a taxpayer.

Counsel for defendants urged that, from the right given to the city of New Orleans to sue and be sued, it resulted, in the absence of prohibitory legislation, that the city has the same right to compromise that an individual has. Ordinarily that may be. We are only concerned with the question before us, relating exclusively to the value of the property assessed, a question which passes, as we take it, each

year, from the board of assessors and local authorities to the courts, after the date set down in the statute. We take it, also, that after an assessment has been made the value of the property cannot be changed, so that it will have less value, as relates to the city or the parishes, than the assessment for the state. Const. 1898, art. 225.

For reasons assigned, the judgment appealed from is affirmed.

GARRISON

v.

CITY OF LAURENS *et al.*

(*Supreme Court of South Carolina, March 20, 1899.*)

Municipal Corporations—Powers—Exemptions from Taxation.*—Under a state constitution requiring all property to be assessed for taxation, a municipal corporation has no power to exempt property from municipal taxation.

Mandamus—Parties.—A writ of *mandamus* to compel the payment of municipal taxes will not lie at the instance of one who is neither a taxpayer nor a citizen of the municipality.

THE petition of relator is as follows (omitting formal parts):

"Your relator respectfully shows unto the court: (1) That he is now, and was at the times hereinafter named, a citizen of the county and state above written, and of the city of Laurens, residing therein; and your relator owns, and pays taxes upon, considerable real and personal property, to the county and state aforesaid, and to the city of Laurens, on his property situate therein. (2) That the city of Laurens is now, and was at the times hereinafter named, a body politic and corporate, so created under the laws of this state, and is known as and called the 'City of Laurens.' That said the city of Laurens is governed by a mayor and six aldermen,

*See note at end of case.

who are now the respondents W. R. Richey, mayor; F. P. McGowan, B. A. Sullivan, J. S. Bennett, C. H. Roper, L. S. Fuller, and C. B. Bobo, aldermen; and said mayor and aldermen are known as and called the 'City Council of Laurens.' (3) That the respondent L. G. Balle is the clerk of the city council of Laurens. (4) That the Laurens Cotton Mills is now, and was at the times hereinafter named, a corporation created by and under the laws of the state of South Carolina, with its principal place of business in the city of Laurens, county and state above written, and is possessed of and owns a great amount of property, both real and personal, situate in the city of Laurens. That for the year of 1896 the Laurens Cotton Mills returned for taxation for county and state purposes property valued in said return at the sum of six thousand and fifteen dollars, which said property was situate in the city of Laurens, and subject to taxation therein for city purposes. (6) That for the year 1897 the Laurens Cotton Mills returned for taxation for county and state purposes property valued in said return at the sum of one hundred and fifty thousand and two hundred and ten dollars, which said property was situate in the city of Laurens, and subject to taxation therein for city purposes. (7) That for the year 1898 the Laurens Cotton Mills returned for taxation for county and state purposes property valued in said return at the sum of two hundred and thirty-five thousand dollars, which said property is situate in the city of Laurens, and is subject to taxation therein for city purposes, and for the purpose of paying the interest on and creating a sinking fund with which to redeem the bonds issued by the city of Laurens for waterworks and electric lights. (8) That the city of Laurens, governed by the city council of Laurens, levied upon the property of her citizens, and collected from them, except the respondent the Laurens Cotton Mills, for the year 1896, 5 mills on the dollar, for the year 1897 5 mills on the dollar, and for the year 1898 9 mills on the dollar, on the assessed value of their property. (9) That on the 18th day of February, 1893, the city council of

Laurens, without authority in law, and overstepping its power as such, passed a resolution of which the following is a copy: 'The council convened in council chamber Feb'y 18, 1893. Present: N. B. Dial, mayor; Messrs. Garrett, Roland, Hudgens, and King, aldermen. It was resolved that all city taxes be remitted for the period of twelve years (12) to any cotton, wool, or thread factory which might be erected within the corporate limits of this city. An ordinance relative thereto is to be drawn up by the mayor. L. G. Balle, Clerk.' (10) That such ordinance has never been drawn up, yet since that time, to wit, in the year 1896, the Laurens Cotton Mills were being built in the city of Laurens, and owned property therein, as hereinbefore alleged; and under and by virtue of said resolution no taxes for city purposes were collected, or attempted to be collected, from the Laurens Cotton Mills for the said year 1896 or for the year 1897, although the city of Laurens, by and through its city council and its clerk, collected from your relator and other citizens of the city of Laurens taxes upon their property at the rate hereinabove alleged. (11) That on the —— day of ——, 1898, the city council of Laurens, without authority in law, and overstepping its powers as such, passed an ordinance of which the following is a copy: 'State of South Carolina, County of Laurens, the City of Laurens. A resolution to cancel the levy and assessments made by the clerk of the city of Laurens for the year 1898 against Laurens Cotton Mills. Be it resolved by the city council of Laurens: (1) That whereas on Feb. 18, 1893, the city council of Laurens passed a resolution "that all city taxes be remitted for the period of twelve years to any cotton, wool, or thread factory which might be erected within the corporate limits of the city of Laurens," the clerk of the city council of Laurens be, and he is hereby, authorized and directed to cancel the levy and assessment intended for municipal taxation upon the tax book of said city for the year 1898 against the property of Laurens Mills established within the corporate limits of the city of Laurens, since the adoption of said reso-

lution, exclusively for manufacturing purposes, to wit, one hundred and fifty thousand two hundred and ten dollars ($150,210), and that the said clerk do not collect taxes on said assessment for said year: L. G. Balle, Clerk. W. R. Richey, Mayor.' (12) That by reason of the said resolution, and the ordinance afterwards passed by the city council of Laurens, the clerk of said council has never collected or attempted to collect the taxes justly due and owing by the Laurens Cotton Mills to the city of Laurens, and has canceled the assessments for the years 1896, 1897, and 1898; and by reason thereof your relator has had to pay a great deal more taxes upon the property owned by him in the city of Laurens, and all other citizens of Laurens have in a like manner been more heavily taxed by reason thereof. (13) That no election has ever been held as is required by law for the purposes of determining whether the citizens of the city of Laurens are in favor of the exemption of the Laurens Cotton Mills from taxation, and the city council of Laurens has wrongfully gone beyond the powers conferred upon it by the constitution and laws of this state, in passing the resolution and ordinance herein set forth, and has thereby made an unjust discrimination in favor of the Laurens Cotton Mills, to the great hurt and wrong of the other citizens of the city of Laurens. (14) That your relator is informed and believes that there is now due by the Laurens Cotton Mills to the city of Laurens for taxes for the year of 1896 the sum of thirty and 75-1000 dollars, for the year 1897 the sum of seven hundred and fifty-one and 5-100 dollars, for the year 1898 the sum of two thousand one hundred and fifteen dollars; the whole amount now due being two thousand eight hundred and ninety-six and 125-1000 dollars, none of which has ever been paid. (15) That your relator has no adequate remedy at law whereby he can be relieved from this unjust discrimination and burden placed upon him and other citizens of the city of Laurens, for the benefit of all whom he brings this action. (16) That a reasonable attorney's fee should be allowed the

attorney for relator in this action, for the bringing of the same.

"Wherefore relator prays: (1) That a writ of *mandamus* do issue from this honorable court, requiring and commanding the city clerk of the city of Laurens to restore to the tax books the assessments against the Laurens Cotton Mills, and collect the same. (2) That the resolution and ordinance be declared unconstitutional and void, and the city council of Laurens be required to repeal and revoke the same. (3) That a reasonable attorney's fee be allowed the attorney for relator herein for the bringing of this action. (4) For such other and further relief as to the court may seem just and equitable."

The return of the Laurens Cotton Mills, (omitting formal parts), reads as follows:

"The Laurens Cotton Mills, responding to the rule to show cause issued by this honorable court, and for cause why the writ prayed for should not issue, respectfully shows: (1) It has no knowledge, or information sufficient to form a belief, as to the allegations contained in paragraphs 1, 8, 10, 11, 12, and 13 of the petition, and it therefore denies the same. (2) It denies the allegations contained in paragraphs 5, 6, 7, 14, 15, and 16 of the said petition. (3) It admits the allegations contained in paragraphs 2, 3, and 4 of the said petition. (4) The respondent admits so much of paragraph 9 as alleges the passage of the resolution by the city council. The balance of the said paragraph it denies.

"By way of defense to the petitioner's supposed cause of action, the said respondent alleges: First. That the petitioner's action ought to have been brought in the name of, and with the consent of, the state of South Carolina. Second. That the petition does not state facts sufficient to constitute a cause of action, or facts sufficient to justify this court in granting the relief prayed for, as against the respondents now before the court. Third. That the petition demands the issuance of the writ against the wrong parties. Fourth. This respondent alleges that none of its property is liable to

be assessed for city purposes, nor has any of said property been put upon the tax book of the city of Laurens in the manner prescribed by law. Fifth. That the failure of the city council to do and perform the acts complained of by the relator, if such failures there have been, was the failure of the predecessors in office of the present city council; and this respondent submits that the present council cannot be held responsible for, and required to perform the duties of, their said predecessors in office. Sixth. That the respondent has paid, and taken receipt for, all taxes assessed against it by the city council of Laurens for each and every year since its organization. Seventh. This respondent alleges that the city council of Laurens, in pursuance of the resolution described in paragraph 9 of relator's petition, did duly pass an ordinance in accordance with the terms of the said resolution. Eighth. That the said the city of Laurens and the said city council of Laurens, having held out to the general public and to the respondent that a cotton factory established within the corporate limits of said city should be free for a period of twelve years from assessment and taxation for city purposes, and having by such representation induced many parties at home and abroad to take stock,—among whom was the relator,—and establish said Laurens Cotton Mills within the corporate limits of said city, are now estopped, under this conduct, from levying and collecting taxes upon the property of the said Laurens Cotton Mills for city purposes. Further, that the citizens of the said city, before the building of the said Laurens Cotton Mills, and with a view of securing the building of the same, held several public meetings, which were attended by the relator and others, and announced to the general public that such property should not be taxed for city purposes for a period of twelve years; and the respondent submits that the relator and all other citizens of the said city of Laurens are estopped from bringing and maintaining this action. Further, that the relator and all other citizens of the said city of Laurens were well informed of said public meetings, and of the representations and inducements held

out to this respondent to establish itself within the corporate limits of said city, and by their silence, acquiescence, and seeming approval not only influenced this respondent to establish itself within the corporate limits of said city, but by their continued silence, acquiescence, seeming approval, and laches after it had established itself, caused the respondent to double its capacity and investment. Whereas, but for the representations and inducements held out to the respondent as aforesaid, and but for the silence, acquiescence, and seeming approval as aforesaid, the respondent would not have established itself within the corporate limits of said city, and but for the continued silence, acquiescence, seeming approval, and laches as aforesaid, the respondent most assuredly would not have doubled its capacity and investment. And the respondent submits that by reason of said silence, acquiescence, seeming approval, and laches, the relator and all other citizens of the said city of Laurens are estopped from bringing and maintaining this action. Wherefore respondent asks that the petition be dismissed, with costs."

J. B. Park, for relator.

N. B. Dial and *Ferguson & Featherstone*, for respondent Laurens Cotton Mills.

POPE, J. This is an application for the writ of *mandamus* addressed to this court in the exercise of its original jurisdiction. The relator, as a taxpayer and citizen of the city of Laurens, is desirous of having the respondent the Laurens Cotton Mills pay its taxes for the years 1896, 1897, and 1898, from which it was excused under a resolution adopted by the city council of Laurens in the year 1893, wherein cotton mills, thread factories, etc., would be excused from all municipal taxes for 13 years, if they, or either one of them, would locate in the city of Laurens. No ordinance was passed until 1898. The Laurens Cotton Mills were incorporated in 1896. Upon the presentation of the petition (which petition will be reported) for the writ

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in question, the usual order was passed, requiring the respondents to make return thereto. The respondent the city council of Laurens made a return virtually admitting all the allegations of fact set up in the petition, but insisting that its co-respondent was not liable to pay any taxes for the years 1896, 1897, 1898. But the return (which return, so far as the first, second, third, and fourth paragraphs are concerned, will be reported) of the Laurens Cotton Mills denied that the relator was a citizen or owned property in the city of Laurens; denied the allegations of fact set out in the petition, alleging that it had been assessed to pay taxes in the years 1896, 1897, and 1898, and so on. On the 12th day of December, 1898, the relator demurred to the returns of the respondents. By this step he admits the allegations of fact as set out in the returns. So far as the city of Laurens, or the city council of Laurens, or its clerk and treasurer, is concerned, the demurrer to their return is well taken.

There was no power in the city council of Laurens, in the year 1893, to exempt, or to promise to exempt, factories from taxation, upon their location in the city of Laurens. Such a step was in palpable violation of the constitution adopted in 1868; for that instrument required all property, real and personal, to be assessed for taxation. It is useless to multiply words in the discussion of this point, for it has recently been considered in the case of Germania Sav. Bank *v.* Town of Darlington, 50 S. C., at pages 366–368, 27 S. E. 846, and that case is practically conclusive of this. If, then, the city council of Laurens had no authority to release the property of the Laurens Cotton Mills from taxation, then their resolution and ordinance directing their clerk and treasurer, the respondent L. G. Balle, to cancel the assessment of the property of such Laurens Cotton Mills for taxation, was illegal, null, and void. No matter what may have been the method recognized in the law for the laying of taxes upon

Municipal Corporations—Powers—Exemptions from Taxation.

assessed values of property prior to the adoption of the last constitution, it is now required that the assessment of the property within the limits of a municipality for taxation for state and county purposes shall be the assessment of such property for city or town taxes. There never was any power in this state, after 1868, to release property from taxation, until the constitution of 1895 gave cities and towns such power for the limited period of five years, and upon the matter being submitted to the voters of such city or town for their approval.

Thus far we have dealt with the respondents except the Laurens Cotton Mills. The relator is not so fortunate, just yet, with this respondent. Having demurred to the return of this respondent, he has, as before remarked, admitted all the facts set out in its return to be true. If this be so, the relator, J. H. Garrison, is neither a citizen nor taxpayer in the town of Laurens. If these things be true, what right has he to bring this proceeding against the respondent? Again, the respondent denies all the allegations of fact touching the assessment of its property for taxation. Well, in this aspect of the case,—certainly just now,—the relator has no right to proceed any further, in the present status of the pleadings and proofs, against the Laurens Cotton Mills. But we see no reason why the parties—the relator and this particular respondent—may not be required either to have the issue of facts tried by a jury or a special referee. We will overrule the demurrer of the relator, so far as the Laurens Cotton Mills is concerned, and we will let the writ against the city council of Laurens await the termination of the contest between the relator and the Laurens Cotton Mills. It is ordered, therefore, that the returns of all the respondents, except the Laurens Cotton Mills, be held insufficient, but that the demurrer of the relator to the return of the Laurens Cotton Mills be not sustained, with leave to the relator to apply for a trial of the issue of facts between himself and the Laurens Cotton Mills in one of the

Mandamus—Parties.

Note

methods required by law. In the meantime the issuance of the writ of *mandamus* against the city council of Laurens will be stayed.

NOTE.

Municipal Corporations—Power to Grant Exemptions from Taxation.—Municipal corporations, unless expressly authorized, cannot grant exemption from, or commutation of taxes. State *v.* Hannibal, etc., R. Co., 75 Mo. 208; Brewer Brick Co. *v.* Brewer, 62 Me. 62, 16 Am. Rep. 395; State *v.* Fyler, 48 Conn. 145; State *v.* Gracey, 11 Nev. 223; Mack *v.* Jones, 21 N. H. 393; Hayzlett *v.* Mt. Vernon, 33 Iowa 229; Gilman *v.* Sheboygan, 2 Black (U. S.) 510; People *v.* Campbell, 93 N. Y. 196; Whiting *v.* West Point, 88 Va. 905.

In Bowen *v.* Newell, 16 R. I. 238, it was held that where a town was authorized to grant to any person the right of laying water pipes, etc., and to exempt such pipes from taxation, the exemption from taxation of pipes already laid was not authorized.

In State *v.* Hannibal, etc., R. Co., 75 Mo. 209, a contract of the city of Hannibal with a railroad company to exempt its property from city taxation, was held invalid, the city having no right to make exemptions. See also St. Joseph *v.* Hannibal, etc., R. Co., 39 Mo. 476; Lexington *v.* Aull, 30 Mo. 480; and in Austin *v.* Austin Gas Co., 69 Tex. 180, the contract with defendant company to exempt its property, in consideration of benefits granted to the city, was held to be void upon the same ground. In New Orleans *v.* New Orleans Water Works Co., 36 La. Ann. 432, although the exemption from taxation of defendant's property was in consideration of defendant's obligation to supply free water to the city, the city's demand for taxes was sustained. But in Grant *v.* Davenport, 36 Iowa 396, an exemption of the property of a water-works company for a similar consideration was held not invalid. In *Georgia*, it was held that, under a general power to tax all property, a corporation might leave certain species of property untaxed. Athens *v.* Long, 54 Ga. 330; Waring *v.* Savannah, 60 Ga. 93.

CITY OF COVINGTON

v.

COMMONWEALTH OF KENTUCKY.

(*Supreme Court of the United States, Feb. 20, 1899.*)

Municipal Corporations—Exemptions from Taxation—Repeal of Statute—Impairment of Contract Obligations.—A city was authorized to acquire property for water-works purposes, by an act which provided that the property so acquired should be and forever remain exempt from taxation. *Held*, that such act was passed subject to a general statute in force at the time providing that all statutes "shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed"; and that such exemption was not a contract the obligation of which could not be impaired by a subsequent statute or constitution.

Statutes—Whether Subject to Repeal.—Before a statute relating to taxation should be held to be irrepealable or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; and it is not so expressed when the existence of such intent arises only from inference or conjecture.

Municipal Charters—Whether Contracts.—Neither a municipal charter nor any legislative act regulating the use of property held by a municipal corporation for governmental or public purposes is a contract, within the meaning of the contract clause of the constitution of the United States.

ERROR by defendant of the State of Kentucky to the Court of Appeals. *Affirmed.*

William Goebel, for plaintiff in error.

Ramsey Washington and *W. S. Taylor*, for the Commonwealth of Kentucky.

MR. JUSTICE HARLAN delivered the opinion of court.

The plaintiff in error, a municipal corporation of Kentucky, insists that, by the final judgment of the court of appeals of

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that commonwealth (39 S. W. 836), sustaining the validity of certain taxation of its waterworks property, it has been deprived of rights secured by that clause of the constitution of the United States which prohibits any state from passing a law impairing the obligation of contracts. That is the only question which this court has jurisdiction to determine upon this writ of error. Rev. St. U. S. § 709.

By an act of the general assembly of Kentucky approved May 1, 1886, the city of Covington was authorized to build a water reservoir or reservoirs within or outside its corporate limits, either in the county of Kenton or in any county adjacent thereto, and acquire, by purchase or condemnation in fee simple, the lands necessary for such reservoirs, and connect the same with the water-pipe system then existing in the city; to build a pumping house near or adjacent to the Ohio river, and provide the same with all necessary machinery and appliances, together with such lands as might be needed for the pumping house, and for connecting it with said reservoir or reservoirs. Section 21.

The declared object of that legislation was that the city and its citizens might be provided with an ample supply of pure water for all purposes. To that end, the city was authorized and empowered, by its board of trustees, to issue and sell bonds to an amount not exceeding $600,000, payable in not more than 40 years after date, with interest at a rate not exceeding 5 per cent. per annum; such bonds not, however, to be issued until the question of issuing them and the question of the location of the reservoir or reservoirs, whether above or below the city, should first be submitted to the qualified voters of the corporation at an election held for that purpose, and approved by a majority of the votes cast.

By section 31 of that act it was provided that "said reservoir or reservoirs, machinery, pipes, mains and appurtenances, with the land upon which they are situated, shall be and remain forever exempt from the state, county and city tax." Acts Ky. 1885–86, p. 317, c. 897.

A subsequent act, approved February 15, 1888, authorized the city, in execution of the provisions of the act of 1886, to issue and sell bonds to the additional amount of $400,000. Acts Ky. 1886–88, p. 221, c. 137.

The scheme outlined in these acts received the approval of the majority of the votes cast at an election held in the city, and thereafter bonds to the amount of $600,000 and $400,000 were issued in the name of the city, and disposed of.

The proceeds of the bonds were duly applied by the city in building water reservoirs, in constructing the requisite approaches, pipes, and mains, in acquiring the lands necessary for the reservoirs and for its approaches and connections, in erecting a pumping house and providing it with necessary machinery and appliances, and in buying land for a pumping house, and the connection thereof by pipes and mains with the reservoirs.

The entire works, upon their completion, passed under the control of the city which managed the same until March 19, 1894, by the commssioners of waterworks, under the act of March 31, 1879, c. 121 (Acts Ky. 1879, p. 93); and since March 19, 1894, they have been controlled under the act of that date (chapter 100), by a board, subject to such regulations as the city by ordinance might provide. Acts Ky. 1894, p. 278. By the latter act it was also provided that the net revenue derived from its waterworks by any city of the second class—to which class the city of Covington belongs—should be applied exclusively to the improvement or reconstruction of its streets and other public ways.

When the above act of May 1, 1886, was passed, there was in force a general statute of Kentucky, passed February 14, 1856, which provided, as to all charters and acts of incorporation granted after that date, that "all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed; provided, that whilst privileges and franchises so

granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested"; and that "when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid." 2 Rev. St. Ky. p. 121.

This statute was not modified by the general revenue statute of May 17, 1886, which took effect September 14, 1886, and became part of chapter 68 of the General Statutes of 1888. It constitutes section 1987 of the revision known as the "Kentucky Statutes of 1894." Nor has it been changed by any subsequent legislation in Kentucky.

The present constitution of Kentucky, adopted in 1891, contains the following provisions:

"Sec. 170. There shall be exempt from taxation public property used for public purposes: * * *.

"Sec. 171. The general assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"Sec. 172. All property, not exempted from taxation by this constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his

office, and be otherwise punished as may be provided by law."

By the Kentucky Statutes of 1894 it is provided:

"Sec. 4020. All real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

"Sec. 4022. For the purposes of taxation, real estate shall include all lands within this state and improvements thereon; and personal estate shall include every other species and character of property—that which is tangible as well as that which is intangible."

"Sec. 4026. The following property is exempt from taxation: Public property used for public purposes. * * *"

This act repealed all acts and parts of acts in conflict with its provisions, except the act of June 4, 1892, providing additional funds for the ordinary expenses of the state government, and the act amendatory thereof, approved July 6, 1892.

In the year 1895 certain lands acquired under the above act of May 1, 1886, and constituting a part of the Covington waterworks, were assessed for state and county taxation, pursuant to the statutes enacted after the passage of that act, and conformably as well to the constitution of Kentucky if that instrument did not exempt them from taxation. The taxes so assessed not having been paid, those lands, after due notice, were sold at public outcry by the sheriff (who by law was the collector of state and county revenue); and, no other bidder appearing, the commonwealth of Kentucky purchased them for $2,187.24, the amount of the taxes, penalty, commission, and cost of advertising.

City of Covington *v.* Commonwealth of Kentucky

The present action was brought by the commonwealth to recover possession of the property so purchased.

The principal defense is that the provision in the act of May 1, 1886, that the reservoir or reservoirs, pumping house, machinery, pipes, mains, and appurtenances, with the land upon which they are situated, "shall be and remain forever exempt from state, county and city taxes," constituted, in respect of the lands in question, a contract between the city of Covington and the commonwealth of Kentucky, the obligation of which was impaired by the subsequent legislation to which reference has been made."

Referring to section 170 of the present constitution of Kentucky, declaring that "there shall be exempt from taxation public property used for public purposes," the court of appeals of Kentucky, in this case, said: "It was followed by necessary statutory enactments, which, however, could neither curtail nor enlarge exemption from taxation, as prescribed by the constitution; and accordingly, in section 4020, Ky. St., adopted for the purpose of carrying out the provisions of section 170, is the identical language we have quoted. As it was manifestly intended by both the constitution and statute to make subject to taxation all property not thereby in express terms exempted, it results that, unless the waterworks property of the city of Covington be, in the language or meaning of section 170, 'public property used for public purposes,' it must be held, like similar property in other cities, subject to taxation, and the special act of May 1, 1886, stands repealed. Assuming, as a reasonable and beneficial rule of construction requires us to do, that the phrase 'for public purposes' was intended to be construed and understood according to previous judicial interpretation and usage, there can be no doubt of the proper meaning and application of it, for in the cases cited and others, where the question of subjecting particular property of cities to taxation arose, the words 'for public purposes' had been held by this court to mean in that connection the same as the words 'for governmental purposes,' and so property used by a city

for public or governmental purposes was held to be exempt, while that adapted and used for profit or convenience of the citizens, individually or collectively, was held to be subject to taxation; and, recognizing and applying that distinction, waterworks property of a city has been invariably treated by this court as belonging to the latter class, and consequently subject to state and county taxation. In our opinion, the property in question is, under the constitution, subject to taxation, and the statute enacted in pursuance of it operated to repeal the special act of May 1, 1886."

However much we may doubt the soundness of any interpretation of the state constitution implying that lands and buildings are not public property used for public purposes when owned and used under legislative authority by a municipal corporation, one of the iustrumentalities or agencies of the state, for the purpose, and only for the purpose, of supplying that corporation and its people with water, and when the net revenue from such property must be applied in the improvement of public ways, we must assume, in conformity with the judgment of the highest court of Kentucky, that section 170 of the constitution of that commonwealth cannot be construed as exempting the lands in question from taxation. In other words, we must assume that the phrase "public purposes" in that section, means "governmental purposes," and that the property here taxed is not held by the city of Covington for such purposes, but only for the "profit or convenience" of its inhabitants, and is liable to taxation, at the will of the legislature, unless, at the time of the adoption of the constitution of Kentucky, it was exempt from taxation in virtue of some contract the obligation of which is protected by the constitution of the United States.

Municipal Corporations—Exemptions from Taxation—Repeal of Statute—Impairment of Contract Obligations.

The fundamental question in the case, then, is whether, at the time of the adoption of that constitution, the city of Covington had, in respect of the lands in question, any contract with the state the obligation of which could not be impaired by any subsequent statute or by the present constitution

of Kentucky, adopted in 1891. If the exemption found in the act of 1886 was such a contract, then it could not be affected by that constitution any more than by a legislative enactment.

We are of opinion that the exemption from taxation embodied in that act did not tie the hands of the commonwealth of Kentucky, so that it could not, by legislation, withdraw such exemption, and subject the property in question to taxation. The act of 1886 was passed subject to the provision in a general statute of Kentucky, above referred to, that all statutes "shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed." If that act in any sense constituted a contract between the city and the commonwealth, the reservation in an existing general statute of the right to amend or repeal it was itself a part of that contract. Griffin *v.* Insurance Co., 3 Bush, 592. The city accepted the act of 1886, and acquired under it the property taxed subject to that reservation. There was in that act no "plainly-expressed" intent never to amend or to repeal it. It is true that the legislature said that the reservoirs, machinery, pipes, mains, and appurtenances, with the land upon which they were situated, should be forever exempt from state, county, and city taxes. But such a provision falls short of a plain expression by the legislature that at no time would it exercise the reserved power of amending or repealing the act under which the property was acquired. The utmost that can be said is that it may be inferred from the terms in which the exemption was declared that the legislature had no purpose, at the time the act of 1886 was passed, to withdraw the exemption from taxation; not that the power reserved would never be exerted, so far as taxation was concerned, if in the judgment of the legislature the public interests required that to be done. The power expressly reserved to amend or repeal a statute should not be frittered away by any construction of a subsequent statute based upon mere inference. Before a statute—particularly one

relating to taxation—should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture. Statutes—Whether Subject to Repeal.

The views we have expressed as to the power of the legislature under a reservation made by general statute of the right to amend or repeal are supported by many adjudged cases: Tomlinson *v.* Jessup, 15 Wall. 454, 457; Railroad Co. *v.* Maine, 96 U. S. 499, 510; Railroad Co. *v.* Georgia, 98 U. S. 359, 365; Hoge *v.* Railroad Co., 99 U. S. 348, 353; Sinking Fund Cases, 99 U. S. 700, 720; Greenwood *v.* Freight Co., 105 U. S. 13, 21; Close *v.* Cemetery, 107 U. S. 466, 476, 2 Sup. Ct. 267; Waterworks Co. *v.* Schottler, 110 U. S. 347, 352, 4 Sup. Ct. 48; Louisville Gas Co. *v.* Citizens' Gas-Light Co., 115 U. S. 683, 696, 6 Sup. Ct. 265; Gibbs *v.* Gas Co., 130 U. S. 396, 408, 9 Sup. Ct. 553; Sioux City St. Ry. Co. *v.* Sioux City, 138 U. S. 98, 108, 11 Sup. Ct. 226; Water Co. *v.* Clark, 143 U. S. 1, 12, 12 Sup. Ct. 346. In Tomlinson *v.* Jessup, above cited, referring to the reserved power to amend and repeal, this court said: "The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the state control over its contract with the corporators, which, without that provision, would be irrepealable, and protected from any measures affecting its obligation. There is no subject over which it is of greater moment for the state to preserve its power than that of taxation. * * * Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the

legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state." So, in Railroad Co. *v.* Maine, above cited: "By the reservation in the law of 1831, which is to be considered as if embodied in that act [one subsequently passed], the state retained the power to alter it in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities. The existence of the corporation and its franchises and immunities, derived directly from the state, were thus kept under its control."

In our consideration of the question of contract, we have assumed, in harmony with the judgment of the court of appeals of Kentucky, that the property in question was held by the city only for the profit or convenience of its people collectively; that is, in its proprietary, as distinguished from its governmental, character. There are cases adjudging that the extent of legislative power over the property of municipal corporations, such as incorporated towns and cities, may depend upon the character in which such property is held. Mr. Dillon, in his work on Municipal Corporations, says: "In its governmental or public character, the corporation is made, by the state, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state, rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers, the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the constitution of the particular state. But, in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected

with the government of the state at large, but for the private advantage of the compact community, which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it, or the rights represented by it, is omnipotent." 1 Dill. Mun. Corp. (4th Ed.) pp. 107, 108, § 67, and authorities cited.

If, however, the property in question be regarded as in some sense held by the city in its governmental or public character, and therefore as public property devoted to public purposes,—which is the interpretation of the state constitution for which the city contends,—there would still be no ground for holding that the city had in the act of 1886 a contract, wtthin the meaning of the constitution of the United States. A municipal corporation is a public instrumentality, established to aid in the administration of the affairs of the state. Neither its charter nor any legislative act regulating the use of property held by it for governmental or public purposes is a contract, within the meaning of the constitution of the United States. If the legislature choose to subject to taxation public property held by a municipal corporation of the state for public purposes, the validity of such legislation, so far as the national constitution is concerned, could not be questioned.

Municipal Charters—Whether Contracts.

In City of New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79, 91, 12 Sup. Ct. 147, after referring to previous adjudications, this court said that the authorities were full and conclusive to the point that a municipal corporation, being a mere agent of the state, "stands in its governmental or public character in no contract relations with its sovereign, at whose pleasure its charter may be amended, changed, or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional

protection." CHANCELLOR KENT, in his Commentaries, says: "In respect to public or municipal corporations, which exist only for public purposes, as counties, cities, and towns, the legislature, under proper limitations, has a right to change, modify, enlarge, restrain, or destroy them; securing, however, the property for the uses of those for whom it was purchased. A public corporation, instituted for purposes connected with the administration of the government, may be controlled by the legislature, because such a corporation is not a contract, within the purview of the constitution of the United States. In those public corporations there is, in reality, but one party, and the trustees or governors of the corporation are merely trustees for the public." 2 Kent, Comm. (12th Ed.) *306. Dillon says: "Public, including municipal, corporations, are called into being at the pleasure of the state; and while the state may, and in the case of municipal corporations usually does, it need not obtain the consent of the people of the locality to be affected. The charter or incorporating act of a municipal corporation is in no sense a contract between the state and the corporation, although, as we shall presently see, vested rights in favor of third persons, if not, indeed, in favor of the corporation or rather the community which is incorporated, may arise under it. Public corporations, within the meaning of this rule, are such as are established for public purposes exclusively,—that is, for purposes connected with the administration of civil or of local government; and corporations are public only when, in the language of CHIEF JUSTICE MARSHALL, 'the whole interests and franchises are the exclusive property and domain of the government itself,' such as *quasi* corporations (so called), counties, and towns or cities upon which are conferred the powers of local administration. Subject to constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent. It may, where there is no constitutional inhibition, erect, change, divide, and even abolish them, at pleasure, as it deems the public

'good to require." 1 Dill. Mun. Corp. (4th Ed.) p. 93, § 54.

In any view of the case, there is no escape from the conclusion that the city of Covington has no contract with the state exempting the property in question from taxation which is protected by the contract clause of the national constitution.

Perceiving no error in the record of which this court may take cognizance, the judgment is affirmed.

FIGG

v.

THOMPSON *et al.*

(*Court of Appeals of Kentucky, Jan. 31, 1899.*)

Contractor's License—Increasing Cost of Improvements—Constitutional Law.*—An ordinance imposing a license fee for the benefit of the city at large as a condition precedent to the right to contract for municipal work tends to impose additional burdens upon property owners subject to local assessments, and is, therefore, unconstitutional and void.

APPEAL by plaintiff from Jefferson county circuit court, law and equity division. *Reversed.*

Lane & Burnett, for appellant.

C. A. Wilson and *H. L. Stone*, for appellees.

GUFFY, J. It is alleged in the petition in this action that by section 35 of an alleged ordinance of the city of Louisville, approved April 1, 1896, entitled "An ordinance providing for certain licenses for the sinking fund of the city of Louisville," it is, among other things, ordained that every person, firm, or corporation engaged in the business of contracting for public, municipal, railroad, or bridge work shall pay a license fee of $100 per annum; and by section 41 of the alleged ordinance

*See note at end of case.

it is ordained that "all licenses shall be paid for in advance in lawful money of the United States, and it shall be unlawful for any firm, person, or corporation to carry on the business, occupation, or profession, or to use or, to exhibit any articles herein mentioned, in the city of Louisville, without first having paid the license herein required for the same"; and by section 44 of said ordinance it is ordained that "any person, firm, or corporation violating any of the provisions of this ordinance, where a different fine has not been provided for, shall be fined not less than five nor more than one hundred dollars for each offense; * * *" and by section 1 of said ordinance it is ordained that said license fee shall be paid to the sinking fund commissioners of the city of Louisville for the purpose of the sinking fund of the city of Louisville. And the plaintiff says that by the alleged ordinance no penalty or fine is prescribed other than is provided in section 44, as herein set out, that plaintiff is engaged in the business of improving by original construction the carriage way of public streets and alleys, and of improving by original construction and reconstruction the public sidewalks of and in the city of Louisville. It is further alleged that when the board of public works orders any work to be done which is authorized by order of said board, or according to law is to be performed by independent contract, said board prepares and places in the office of said department a complete drawing and specification of said work. Thereupon said board causes a notice to be published in a newspaper published in said city once a week for two weeks, informing the public of the general nature of the work, calling for sealed proposals for said work by a day not earlier than ten days after the first of said publication. "* * * Said board shall, if a satisfactory bid be received, let said contract to the lowest bidder." It is further alleged that "improvements," as applied to public ways, shall mean all work and material used upon them in the construction and reconstruction thereof, and that the cost of the improvement of the carriage ways in the construction and reconstruction thereof

shall be apportioned against and paid for by the owners of the lots in the tax limits thereof as defined in said acts, and the improving of sidewalks and improving the curbing thereof by original construction and reconstruction shall be apportioned against, and paid for by, the owners of the ground fronting the improvements according to the number of front feet of their lots fronting the improvements respectively. It is further alleged that the ordinance aforesaid is void, because it is in violation of the provisions of an act approved July 1, 1893, in this: that said ordinance limits the right to contract in the city of Louisville for the improvement or original construction of the carriage ways of the streets, and lots in the city of Louisville, and for improvement by original construction and reconstruction of the public sidewalks in the city of Louisville to such persons only as may pay to the city of Louisville a bonus for such privilege in the shape of $100 per annum as a license so to do. It is further alleged that the ordinance is unconstitutional and void, because it limits the right to submit to the city of Louisville proposals to make such improvements, and limits such proposals to such persons only as pay said city of Louisville $100 per annum for the privilege of so doing. It is further averred that there is in law no such organization as the sinking fund commissioners of the city of Louisville, and that, therefore, the ordinance requiring such tax to be paid to such corporation is null and void. The petition further sets out the fact that the plaintiff was prosecuted in the city court of Louisville, charged with the offense of having violated the ordinance complained of, and fined therefor; and under the provisions of section 163 of the act approved July 1, 1893, for the government of cities of the first class, this plaintiff brought this suit in the Jefferson circuit court, law and equity division, and prayed for a writ of prohibition restraining the police judge, R. H. THOMPSON, *et al.*, from further prosecuting said case against plaintiff. A demurrer was sustained to plaintiff's petition and judgment rendered dismissing the

same, and denying the writ of prohibition, and from that judgment this appeal is prosecuted.

It is earnestly insisted for appellant that there is in law no such corporation or organization as the commissioners of the sinking fund of the city of Louisville. That the expression of the act of July, 1893, which says that "the board of sinking fund commissioners is hereby continued under the existing law," is void, and of no effect, and is in violation of sections 51–59 and 167 of the constitution. But, inasmuch as said sinking fund commission is not a party to this suit, nor does it appear that it is seeking to enforce the collection of the tax, nor the fine imposed by the police court, we deem it unnecessary to enter into a discussion as to the fact whether there are any legal commissioners of the sinking fund of the city of Louisville. From the allegations made in the petition it seems clear to us that the imposition of the license tends to increase the expenses incident to the improvements of sidewalks, streets, etc., and would be imposing additional burdens upon property owners fronting on such improvements. It is also manifest that the imposition of such a license is inconsistent with the general law and ordinance providing that such improvements or work should be let to the lowest responsible or reliable bidder, and for that reason must be held to be illegal and invalid. It is manifestly just and right that all improvements made, the cost of which is to be taxed against the property owners, should be made at the least possible cost; and it is equally manifest that such ordinance as the one in question tends to lessen the number of persons who would be inclined to file bids or propositions for doing work, and tends to create a monopoly in the business of public works. It is also reasonable that the amount paid for license would increase the cost of the improvements, and thus the property holder would be made to pay not only for what it cost to make the improvements, but also to pay his part of the license fee required of the contractor, which would be manifestly unjust and illegal. It must be conceded that to pay for the im-

provements is sufficiently onerous upon the property holder, without also having added thereto a special license to the city as a privilege to the contractor to do the work and charge therefor. It is evidently contrary to natural justice that a city should order improvements to be made at the cost of the abutting property owners, and then add thereto a license fee to the contractor for the benefit of the city at large, which license fee the contractor, according to the well-known rules of business, will estimate in the sum for which he undertakes to do the work. That such license fees as that under consideration tend to lessen the number of bidders, and consequently increase the cost of such improvements, is not open to serious question, and it seems to us unreasonable that the city should order improvements to be made, and then impose a license tax upon the party who undertakes to do the work. Hence it follows that any ordinance or act of the legislature authorizing any such license fee is unconstitutional, and invalid. The prohibition asked for should have been granted. For the reasons stated, the judgment appealed from is reversed, and the cause remanded, with directions to award the writ of prohibition, and for proceedings consistent herewith.

NOTE.

Special Assessments Must Not Exceed Peculiar Benefit.—A special assessment for local improvements must not exceed the value of the peculiar benefit to the property assessed, the exaction of anything in excess of such amount is a taking of private property for public use without just compensation. Creighton *v.* Manson, 27 Cal. 624; Lent *v.* Tillson, 72 Cal. 441; *In re* New Orleans Drainage Co., 11 La. Ann. 373; White *v.* Saginaw, 67 Mich. 33, 40; Tide-water Co. *v.* Coster, 18 N. J. Eq. 528, *aff'g* 18 N. J. Eq. 54; State *v.* Newark, 37 N. J. L. 422; Matter of Canal Street, 11 Wend. (N. Y.) 155. See also State (Frevert *et al.*, Prosecutors) *v.* Mayor, etc., of City of Bayonne, *ante* 299, and *note* 305.

FLORIDA CENT. & P. R. CO.

v.

CITY OF COLUMBIA *et al.*

(*Supreme Court of South Carolina, Feb. 28, 1899.*)

Municipalities — License Taxes — Statutes — Repeal. — The power conferred upon the city of Columbia to impose license taxes by the act of 1871 has not been repealed or abrogated by the present constitution of South Carolina, nor by the act of 1897, which was passed for the purpose of securing uniformity in the mode of the taxation of property, and has no reference to the taxation of persons.

Same—Same—Construction of Statute.—The act of 1871, conferring upon the city of Columbia the power to require all corporations, etc., engaged "in any business or avocation of any kind whatever within the limits of the city" to take out a license, authorizes the imposition of such tax upon a railroad company only doing a portion of its business within the city, although it appears that it owns no property of any kind located within the limits of the city, and runs its trains into the city upon the tracks of another company under a traffic arrangement, and its agent attending to its business therein is also the agent of the other company.

Same. — Statutory provisions merely prescribing a particular method for the valuation of railroad property for taxation do not relate to the taxation of a railroad corporation as a person.

Review.—A point not raised in the lower court will not be considered on appeal.

Common Carriers — License Taxes—Municipal Powers.—Under such statute, although a railroad corporation is compelled by its charter to transact a portion of its business within a city, it can be required by the city to take out a license for doing such portion of its business, and to pay a tax therefor.

APPEAL by plaintiff from Richland county circuit court of common pleas. *Affirmed.*

"Complaint."

"The plaintiff above named, complaining of the above-named defendant, alleges:

*See notes at end of case.

Florida Cent. & P. R. Co. *v.* City of Columbia

"(1) That the city of Columbia is, and was at the times hereinafter named, a municipal corporation duly organized and existing under the laws of the state of South Carolina, and the defendant J. Frost Walker is, and was at the times hereinafter named, the city treasurer of the city of Columbia, duly elected and qualified.

"(2) That the plaintiff was at the times hereinafter named, and is now, a corporation duly organized and existing under the laws of the state of Florida, and is the lessee of a certain railroad line commencing at Cayce's Junction, in the county of Lexington, and extending thence to the city of Savannah, in the state of Georgia; but owns no tracks, depots, warehouses, or other structures or property in the city of Columbia.

"(3) That this plaintiff, as the lessee of said line of railroad, is engaged in operating the same to and from the city of Savannah, in the state of Georgia, to said Cayce's Junction, in the county of Lexington, state of South Carolina, and under a traffic arrangement with the Southern Railway Company runs its trains, engines, and cars into the city of Columbia over the track of said Southern Railway Company, and uses the yards, switches, etc., of the said Southern Railway Company in the city of Columbia for shifting purposes, and delivers to the agent of the Southern Railway Company freight received from points outside of the city of Columbia and outside of the state of South Carolina, within the United States, to consignees within the city of Columbia, and receives freight from consignors at the city of Columbia to consignees at points outside of the city of Columbia and within the state of South Carolina as well as without the same, and receives and transfers passengers to and from the city of Columbia to points outside of the city of Columbia, both within and without the state of South Carolina; its principal business, however, being the receipt and delivery to and from the Southern Railway Company of through freight and passengers from points outside of the city of

Columbia to points outside of the state of South Carolina and within the United States. And this plaintiff, by its traffic arrangement with the Southern Railway Company, as above stated, obtains the services of the agent of the said Southern Railway Company as its agent, contributing a portion of the compensation which he is entitled to receive. But this plaintiff avers that it does no business whatever wholly and exclusively within the city of Columbia, and does no business except interstate business, as aforesaid, other than such as it is compelled by the laws of the state of South Carolina, as a common carrier operating the said southbound railroad, to do.

"(4) That by an act entitled 'An act to alter and amend an act entitled "An act to alter and amend the charter and extend the limits of the city of Columbia,"' approved March 2, 1871, the general assembly of the state of South Carolina conferred the power upon the mayor and aldermen of said city to require all persons, companies, and corporations engaged in any business or avocation of any kind whatever within the limits of the city of Columbia to take out a license from the mayor and aldermen of said city, who are authorized to impose a reasonable charge or tax for the conduct of the same.

"(5) That on the 22d day of December, 1896, the mayor and aldermen of the city of Columbia, in council assembled, passed an ordinance entitled 'An ordinance to regulate licenses for the year 1897,' wherein and whereby it is ordained by section 3 of said ordinance as follows: 'Sec. 3. Every person, firm, company or corporation required by the ordinances of the city of Columbia to obtain a license to engage in any trade, business or profession for which a license is required, shall, before the 15th day of January of each year, register with the city assessor and auditor—First, his or her name or style, and, in case of a firm or company, the names of the several persons constituting such firm or company, and their places of business; second, the trade, business or profession for which a license is required; third, the place where such

trade, business or profession is carried on; and in the case of a dealer in goods, wares or merchandise, the amount, extent and value of business carried on,—all of which shall be given under oath. * * *'

"(6) That it was further ordained by section 4 of said ordinance as follows: 'Sec. 4. If any person or persons exercise or carry on any trade, business or profession for the exercising, carrying on or doing of which a license is required by this ordinance, without first registering and taking out such a license as in that behalf required, he, she or they, besides being liable to the payment of the license, shall be subject to a fine not to exceed $40.00, or imprisonment in the city station house for a time not to exceed thirty days, upon conviction before the mayor or alderman acting mayor.'

"(7) That the mayor and aldermen, in council assembled, further undertook to ordain and impose, by section 8 of said ordinance, a license upon railroads, in the following words and figures: 'Railroads—steam—for business done exclusively within the city of Columbia, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents, $200.00.'

"(8) That it is further ordained by section 12 of said ordinance 'that the city auditor shall be required to summon before the mayor all persons doing business without a license, immediately after January 15th, 1897.'

"(9) That the plaintiff failed and refused to register, as it is required by section 3 of said ordinance, hereinabove set forth, deeming and claiming that said ordinance had no application, and did not include in its terms the plaintiff, and also deeming and claiming that if it was included in it, and by its terms it was attempted to subject it to pay a license, that it was invalid, and contrary to law, and that it (the plaintiff) was not liable to be assessed, taxed, or required to pay any license fee or tax whatsoever to the city of Columbia for the prosecution of its business; and it further declined and refused to pay said license at all.

"(10) That on the 26th day of January, 1897, the city assessor and auditor of the said city of Columbia caused to be served on the agent of the Southern Railway Company, so acting as agent for this plaintiff as aforesaid, a summons in words and figures following: 'Office of City Assessor and Auditor, Columbia, S. C., January 26, 1897. F. C. and P. R. R. Co.: You are hereby summoned to appear before his honor, the mayor, on the 29th inst., at 9:30 o'clock a. m., to answer the charge of doing a business without a license, in violation of the city ordinance. By order of the mayor. T. T. Talley, City Assessor and Auditor.' That this plaintiff, through and by its attorney, appeared, in response to said summons, before the mayor of the city of Columbia, and protested against its liability to pay a license tax; but the said mayor of the city of Columbia announced his decision that this plaintiff was liable to pay said license tax, and that, if the same was not paid on or before a day named,—being a few days after the appearance before council,—that an additional fine of forty dollars would be imposed upon said plaintiff for transacting any business, and that said fine would be imposed for every day business was so conducted within the city of Columbia; whereupon this plaintiff filed its petition before the mayor and aldermen of the city of Columbia, in council assembled, setting out the character of business which it transacted as hereinbefore alleged, and submitted that it was not liable to any license tax or fee to the city of Columbia, and praying that it might be heard by council in regard thereto, which petition duly came up before the said mayor and aldermen, in council assembled, and this plaintiff, by its counsel, appeared before said body, but shortly after the matter had been considered, and was informed that the same had been referred to a committee of council with power to act, and was subsequently informed that the said petition had been rejected. This plaintiff, upon being so summoned as aforesaid, to avoid the penalties attempted to be imposed by the said mayor of the city of Columbia, and under the apprehension that said penalties

would be imposed upon it and its agents, and to prevent the imposition thereof, the plaintiff paid said license fee of two hundred dollars to the city treasurer of the city of Columbia, to wit, the defendant J. Frost Walker, and at the same time filed its protest against the action of the said city authorities in said behalf, in words and figures as follows, to wit: 'Columbia, S. C., 28th January, 1897. To J. Frost Walker, Esq., Clerk and Treasurer City of Columbia, Columbia, S. C.—Dear Sir: The Florida Central and Peninsular Railroad Company having been cited to appear before the honorable mayor of the city of Columbia to show cause why it should not be dealt with for doing business in the city of Columbia without a license, would respectfully protest against its liability to pay such license; but to avoid the expense and penalties attaching thereto upon such failure, if it should be held that it is liable to the license fee imposed, it hereby pays the amount thereof, and protests against the validity of the demand. Respectfully, Wm. H. Lyles, Attorney.'

"(11) That the plaintiff submits that it does not come within the terms of said ordinance, and that it does not do any business exclusively within the city of Columbia, and is not liable to said tax; and it further submits that as a common carrier it is compelled by law to receive freight and passengers offered to it for carriage, and cannot refuse to discontinue its said business by virtue of the obligations of its charter; and by reason of its charter obligations it is in duty bound to continue to maintain and operate its said road as it is now operated and maintained, and by reason of such public duties being devolved upon it by the terms of its charter it is not liable to be taxed as and for a license by the city of Columbia.

"Wherefore the plaintiff demands judgment against the said city of Columbia and the defendant J. Frost Walker, city treasurer, for the sum of two hundred dollars, with interest thereon from the 30th day of January, 1897, and the costs and disbursements of this action."

Florida Cent. & P. R. Co. *v.* City of Columbia

Grounds of Demurrer to Complaint.

"The defendants above named, by their attorney, John P. Thomas, Jr., demur to the complaint herein upon the ground that it appears upon the face thereof that it does not state facts sufficient to constitute a cause of action:

"(1) In that it appears from the facts alleged therein that the mayor and aldermen of the city of Columbia were duly authorized by the general assembly of the state of South Carolina to exact of the plaintiff the payment of the license tax paid by it, and sought to be recovered in this action, and to pass the ordinance referred to in the complaint herein, providing for the imposition and collection of said license tax; and that it further appears from the facts alleged therein that a portion of the plaintiff's business is transacted entirely within the state of South Carolina and the city of Columbia, and that the plaintiff comes within the provisions of the said ordinance, and is liable for the said license tax; the same being imposed for the business done exclusively within the state of South Carolina and the city of Columbia, and not for any business done to or from points without the state, nor for any business done for the government of the United States, its officers and agents.

"(2) In that it appears from the facts alleged therein that the payment of the license tax by plaintiff was not made under such circumstances of coercion or duress as entitle it to recover the same."

C. J. C. Hutson and *Wm. H. Lyles*, for appellant.

H. C. Patton, for respondents.

McIver, C. J. This was an action to recover the sum of $200, paid by plaintiff to the treasurer of the city of Columbia, under protest, as a license tax, illegally, as it is claimed, exacted of plaintiff company. The defendants interposed a demurrer to the complaint upon the ground that the complaint fails to state facts sufficient to constitute a cause of action; and, in accordance with the rule of court, specified in writing two grounds upon which the demurrer should be

sustained, substantially as follows: (1) Because the facts stated in the complaint show that the city authorities of Columbia were duly authorized to impose the tax complained of; (2) because the allegations contained in the complaint do not show that the tax was paid under such circumstances of coercion or duress as entitle the plaintiff to recover the amount paid. The circuit judge, without passing upon the second ground, sustained the demurrer upon the first ground, and dismissed the complaint. From this judgment plaintiff appeals upon the several grounds set out in the record, which substantially raise the single question whether the tax in question was lawfully imposed. The defendants have also, in accordance with the proper practice, given notice that they would ask this court to sustain the demurrer upon the second ground also. Inasmuch as the question turns solely upon the sufficiency of the allegations of the complaint, it will be proper for the reporter to set out in his report of the case a copy of the complaint, as well as a copy of the grounds upon which the demurrer is based.

We will first consider those allegations in the complaint which relate to the first ground upon which the demurrer is rested, with a view to ascertain whether such allegations show that the tax in question was lawfully imposed. These allegations are, substantially, as follows: (1) That the city of Columbia is a municipal corporation. (2) That the plaintiff is a corporation duly organized under the laws of the state of Florida, and as such is the lessee of a certain railroad, commencing at Cayce's Junction, in the county of Lexington, S. C., and extending thence to the city of Savannah, in the state of Georgia, but owns no tracks, structures, or other property in the city of Columbia. (3) That the plaintiff, as such lessee, is engaged in operating the said line of railroad between the two *termini* above mentioned, and under a traffic arrangement with the Southern Railway Company runs its trains into the city of Columbia over the tracks of said Southern Railway Company, using the yards, switches, and other appliances of said last-mentioned com-

pany, and delivers to and receives from the agent of said Southern Railway Company, to whose compensation the plaintiff contributes its proper proportion, freight from points outside of the city of Columbia to consignees within said city, as well as freight from consignors in the said city of Columbia to be delivered to consignees outside of said city, and also receives and transfers passengers to and from the said city to and from points outside of said city; but plaintiff avers that it does no business whatever wholly and exclusively within the city of Columbia, and does no business except interstate business other than such, as a common carrier, it is compelled to do. (4) That by the charter of the city of Columbia the general assembly of the state of South Carolina conferred upon the mayor and aldermen of said city the power to require all persons, companies, and corporations engaged in any business or avocation of any kind whatever within the limits of the city of Columbia to take out a license from the mayor and aldermen of said city, who are authorized to impose a reasonable charge or tax for the conduct of the same. (5) That on the 22d of December, 1896, the city council of Columbia passed an ordinance entitled "An ordinance to regulate licenses for the year 1897," certain sections of which are set out in the complaint, which, however, are too long to be inserted here, but which may be seen by reference to the copy of the complaint, which will be incorporated in the report of this case. It is sufficient to say here that by one of the provisions of said ordinance every person, firm, company, or corporation required by the ordinances of said city to obtain a license to engage in any trade, business, or profession for which a license is required shall, before the 15th day of January in each year, register with the city assessor and auditor the name of the person or corporation, etc.; and by another provision of said ordinance a license tax is imposed upon various classes of persons, among others, railroad corporations, in the following language: "Railroads—steam—for business done exclusively within the city of Columbia, and not including any

business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents, $200.00." (6) That the plaintiff failed and refused to register as required, claiming that said ordinance had no application to, and did not include in its terms, the plaintiff company; and, even if it did, said ordinance is invalid, and contrary to law.

Taking these allegations in the complaint, thus stated in brief, to be true, it seems to us clear that the license tax in question was imposed by lawful authority; for they show that the plaintiff is a railroad corporation, doing a portion, at least, of its business within the city of Columbia, with the residents of that city; that the municipal corporation of Columbia has been authorized by the general assembly of this state to impose a license tax upon all persons, companies, or corporations engaged in any business or avocation of any kind whatever within the limits of the city of Columbia; and that such tax has been imposed by an ordinance passed by the proper authorities of said city. If, then, the legislation mentioned in the complaint, both state and municipal, be a valid exercise of the law-making power, we do not see how there can be a doubt as to the legality of the tax in question. It is not, and cannot be, denied that under the constitution of 1868 the general assembly may either itself impose a license tax (State *v.* Hayne, 4 S. C. 403), or may empower a municipal corporation to impose such a tax (State *v.* Columbia, 6 S. C. 1; Charleston *v.* Oliver, 16 S. C. 51; *In re* Jager, 29 S. C. 438, 7 S. E. 605). Nor, as we understand it, is it denied that such a power may be exercised under the present constitution. But the contention is that, at the time the ordinance imposing this tax was passed, the city authorities were not empowered to impose a license tax, because the act of 1871 (14 St. at Large, p. 569), or at least section 8 thereof, conferring such power, had been repealed, first, by the constitution of 1895, and next by the act of 1897 (22 St. at Large, p. 409). The constitution of 1895, in subdivision 1 of section 11 of article 17, expressly declares:

"That all laws in force in this state, at the time of the adoption of this constitution, not inconsistent therewith and constitutional when enacted, shall remain in full force until altered or repealed by the general assembly, or expire by their own limitation;" and in the third subdivision of the same section it is declared that "the provisions of all laws which are inconsistent with this section shall cease upon its adoption," the exception stated not being material to this inquiry. So that all laws of force at the time of the adoption of the present constitution remained in force, unless they were unconstitutional when enacted, or were inconsistent with the provisions of the constitution of 1895. Now, the provisions of section 8 of the act of 1871, above referred to, were certainly not unconstitutional when enacted, for it was expressly held otherwise in State *v.* Columbia, *supra*. Nor do we think there is any inconsistency between the act of 1871 and the provisions of the present constitution. On the contrary, the right to impose license taxes by a municipal corporation is expressly recognized by section 6 of article 8 of the present constitution. "The corporate authorities of cities and towns in this state shall be vested with power to assess and collect taxes for corporate purposes. * * * License taxes imposed shall be graduated so as to secure a just imposition of such tax upon the classes subject thereto."

It is contended, however, that the act of 1871 is inconsistent with section 3 of article 8, which declares that "the general assembly shall restrict the powers of cities and towns to levy taxes and assessments," and it is claimed that there is no such restriction in the act of 1871. It will be observed, in the first place, that the constitution of 1868, in section 9 of article 9, contained a similar provision, and yet in State *v.* Columbia, *supra*, which arose and was decided under the constitution of 1868, such a provision was not found to be any obstacle to declaring the act constitutional. But, in the next place, it is a mistake to say that the act of 1871 contains no provision restricting the powers of taxation on the part of the municipal corporation, for in section 5 of that act

the power to impose a tax for the support of the poor is expressly restricted, and in section 12 the power of taxation is still further restricted. And, in addition to this, the act of 1854 (12 St. at Large, p. 333), of which the act of 1871 is an amendment, and must, therefore, be read with it, in its eighth, ninth, and tenth sections imposes restrictions upon the general powers of taxation conferred upon the mayor and aldermen of the city of Columbia. It is clear, therefore, that the power conferred upon the city of Columbia to impose license taxes has not been repealed or abrogated by the present constitution.

Municipalities—License Taxes—Statutes—Repeal.

Next, it is contended that so much of the act of 1871 as empowers the mayor and aldermen to impose a license tax upon persons engaged in any business or avocation is repealed by the act of 1897 (22 St. at Large, p. 409). It is well known, as a matter of legislative history, that prior to the passage of that act some municipal corporations in this state were only invested with power to impose taxes upon real property, while others were empowered to impose taxes upon personal as well as real property, and the sole object of that act was to bring about uniformity in the taxation of property, as required by section 6 of article 8 of the present constitution, and not to deal in any respect with taxation imposed upon persons. The act is entitled "An act to render uniform the mode of taxation in towns and cities in accordance with section 6, article VIII., of the constitution of 1895." In its first section the requirement is that "all municipal taxes levied by cities and towns in this state shall be levied on all property, real and personal, not exempt by law," etc. The second section reads as follows : "That the clauses of the charters of any towns or cities restricting taxation in said towns to real estate only are hereby repealed." And the third section contains a general repealing clause of all acts or parts of acts inconsistent with this act. This act cannot be regarded as a repeal of any previous act empowering any municipal corporation to impose a license tax, as that would be in conflict with the provisions of the constitu-

tion above cited expressly recognizing and requiring that the corporate authorities of cities and towns shall be vested with power to impose taxes upon both persons and property,—expressly mentioning license taxes ; and, besides, the whole tenor of the act shows that it was passed for the purpose of securing uniformity in the mode of taxation of property, and has no reference to the taxation of persons.

Same—Same—Construction of Statute.

Again, it is contended that in the act of 1871, conferring the power to impose taxes on a person carrying on any business or avocation within the city of Columbia, the term "business" was used in the sense of the word "avocation," and does not authorize the imposition of such a tax upon a railroad company which does only a portion of its business within the city of Columbia. It does not seem to us that the act requires, or even justifies, any such construction. Both terms are used in the act, the language of the act being that "power is conferred" to require all persons, companies, and corporations engaged "in any business or avocation of any kind whatever within the limits of the city of Columbia" to take out a license, and pay a reasonable charge or tax therefor. If, therefore, a person or corporation is engaged in business of any kind whatever within the limits of the city, such a tax may be imposed ; and the complaint shows on its face that the plaintiff is a corporation engaged in business within the limits of the city of Columbia ; and the fact that it is also engaged in business of a similar character outside the city limits cannot affect the question. It has an agent, regularly employed, in the city of Columbia, to attend to its business in that city, for the fact that such agent is also the agent of the Southern Railway Company does not forbid his being also the agent of the plaintiff company ; and is doing business in the city of Columbia in the same manner, though possibly not to the same extent, as any other railroad company having a terminus in said city. Indeed, the construction contended for would lead to the conclusion that, while all persons or corporations doing business in the city of Columbia may be re-

quired to pay a license tax, a railroad company, though enjoying all the advantages of police protection and any other advantages afforded by the city government, is not so liable, for we suppose that it rarely, if ever, happens that a railroad company does all of its business within the corporate limits of any city or town. Such a construction cannot be accepted.

Reliance is also placed upon the word "exclusively," as used in the ordinance, the language being: "Railroads—steam—for business done exclusively within the city of Columbia," etc. But this manifestly does not mean that only those doing business exclusively within the corporate limits of the city are liable to the tax, but the meaning clearly is that the railroad company is taxed only for the privilege of doing such of its business as is done exclusively within the city limits, and not for the privilege of doing any of its other business.

Again, it is contended that, where the general assembly has prescribed a particular method of taxation, no other mode can be adopted; and reference is made to the several sections of the Revised Statutes providing the mode by which railroads must be taxed, which does not include a license tax. But it is very obvious that these provisions are only intended to prescribe the mode in which the value of railroad property may be ascertained for the purpose of taxation of such property, and do not in any way relate to the taxation of a railroad corporation as a person. This is shown by one of the sections (739) cited by appellant from 2 Elliott on Railroads, in which it is said: "Where the statute prescribes a specific method for assessing or *valuing the property* of railroad companies, the method prescribed excludes all others, and must be pursued. The legislative method is always exclusive. The rule is settled that, where the legislature classifies *property*, and prescribes the mode in which *it* shall be taxed, neither the taxing officers nor the courts can prescribe any other." We have italicized such of the language in the foregoing quotation as

Same.

seems to us to point directly to the view which we take. In addition to this, in section 759 of the same volume the author in express terms recognizes the doctrine that a license tax is not a tax upon property, for he says: "Such a tax is not a tax upon property." The position taken by counsel for appellant cannot, therefore, be sustained.

Again, it is contended that the license tax here in question was not graduated, as required by section 6 of article 8 of the present constitution. It is sufficient to say, in answer to this position, that there is no allegation in the complaint upon which such a point can be raised. This court certainly will not assume, in the absence of any allegations to that effect, that the municipal authorities of the city of Columbia have failed to observe the requirements of the constitution.

Review.

Finally, it is contended by appellant that, inasmuch as the plaintiff company is a corporation, compelled by its charter as a common carrier to do such business as it does in the city of Columbia, it cannot be required to take out a license for doing such business, and pay a tax therefor, as the imposition of such a tax is equivalent to the power to prohibit plaintiff from doing that which, by the law of the land, it is required to do. It is sufficient to say that this point is disposed of by the case of State *v.* Columbia, *supra*, where the point was decided adversely to the view contended for by the appellant.

Common Carriers—License Taxes—Municipal Powers.

We are of opinion, therefore, there was no error upon the part of the circuit judge in sustaining the demurrer upon the first ground above stated. Under this view, the question presented by the additional ground upon which defendants have given notice that they would ask this court to sustain the demurrer does not arise, and need not be considered. The judgment of this court is that the judgment of the circuit court be affirmed.

NOTES.

Railroads—Municipal License Taxes.—*Alabama.*—The power to levy taxes and impose license may be transferred to a municipal

corporation, to be exercised within its limits, and a city ordinance requiring every express company or railroad company doing business within the city, and whose business extends beyond the state, to pay an annual license tax of $500 is not in conflict with the Constitution of the United States or of the Constitution of Alabama. Such a license tax is not an import or export duty, nor is it a regulation of commerce among the states, or between a state and a foreign country. Osborne *v.* Mayor, etc., of Mobile, 45 Ala. 493; *affirmed in* 16 Wall. (U. S.) 479.

The fact that a railway company is engaged in interstate commerce does not render a city license tax imposed by a city on such company for the privilege of doing business in the city null and void as contrary to the interstate commerce provisions of the United States constitution. Alabama G. S. R. Co. *v.* City of Bessemer, 6 Am. & Eng. R. Cas., N. S., 410.

California.—A franchise conferred by the legislature, granting the right to construct a railroad through streets of a city and to operate cars thereon, is not such a contract as to exempt the occupation from police regulations, or from a municipal license tax, and the fact that the railroad extends and cars are run beyond the corporate limits does not exempt the occupation from taxation by the municipality. San Jose *v.* San Jose & S. C. R. Co., 53 Cal. 475.

SPAFFORD

v.

TOWN OF NORWICH.

SAME

v.

BROWN *et al.*

(*Supreme Court of Vermont, Jan. 28, 1899.*)

Arrest of Criminals—Rewards—Municipalities—Ultra Vires*—The selectmen of a town offered in its behalf a reward for the arrest and conviction of the person or persons who had removed a body from a grave in a cemetery within its limits. *Held*, that the town could not expend money for such purpose, although towns had

*See notes at end of case.

Spafford *v.* Town of Norwich

legislative authority to maintain actions for damages against persons injuring burial grounds within their respective limits; and there could be no recovery against the town by the person earning the reward.

Same—Same—Same.*—It is no part of the duty of an incorporated town to aid in the arrest or conviction of offenders against the criminal laws of the state, except where there is an express statutory provision on the subject, and it cannot tax its citizens for such purposes.

Construction of Statute.—A statute authorizing a town to vote such sums of money as deemed necessary for the prosecution and defense of the common rights and interests of its inhabitants, and for other incidental town expenses, confers no authority to raise money to aid in enforcing the criminal laws of the state.

Ultra Vires—Personal Liability of Officers.*—The selectmen of the town incurred no personal liability by offering such reward in behalf of the town, plaintiff being chargeable with notice that the offer was *ultra vires*.

EXCEPTIONS by plaintiff from Windsor county court. *Affirmed.*

W. B. C. Stickney, *W. W. Stickney*, and *J. G. Sargent*, for plaintiff.

William Batchelder and *William E. Johnson*, for defendants.

START, J. These cases were heard together. The facts, rulings, and exceptions were substantially alike in both cases. The actions are assumpsit for the recovery of $1,000, alleged to have been offered by Charles A. Brown, A. W. Brigham, and C. E. Ensworth, as selectmen of the town of Norwich, for and on behalf of said town, as a reward for the arrest and conviction of the person or persons who removed the body of Joseph S. Murdock from its grave in the New Cemetery at Norwich, and the recovery of the body. It appeared that the selectmen signed a writing purporting to offer such a reward, and caused printed copies of the same to be posted. The plaintiff offered one of these posters in evidence, and, in connection therewith, offered to show that the publication of the same

Case Stated.

*See notes at end of case.

came to his knowledge; that, acting upon and influenced thereby, he worked diligently to earn the reward, which he understood was lawfully offered by the defendant town; and that he complied with the terms of the offer, demanded payment, and payment was refused. The court excluded the poster and evidence offered in connection therewith, and ordered a verdict for the defendants in both cases; and the plaintiff excepted.

Arrest of Criminals—Rewards—Municipalities—Ultra Vires.

The plaintiff contends that, by V. S. § 5007, an action for damages is given to towns against persons who injure burial grounds within their respective corporate limits, that the procuring of evidence for the successful prosecution of such an action is within the corporate powers of a town, and that the discretion as to what expense shall be incurred, and what means taken to find and procure the necessary evidence, rests with the selectmen. It did not appear, nor was there any offer to show, that the town's property had been injured by the removal of the body or otherwise, that the town had a cause of action against any one therefor, or that the reward was offered for the arrest and conviction of a person or persons for injuring or taking away the town's property. The reward was offered for the arrest and conviction of the person or persons who removed the body, and for its return. The poster that came to the plaintiff's knowledge, and on which he acted, admits of no other interpretation. It states that "the town of Norwich will pay one thousand dollars for the arrest and conviction of the person or persons who removed the body of the late Joseph S. Murdock from its grave in the New Cemetery at Norwich, and the recovery of the body." The liability of the town, as shown by the plaintiff's offer, was dependent upon whether it could bind itself to pay a reward for the purpose stated in the poster, and whether the selectmen had authority to offer the reward. It is no part of the duty of towns to take charge of criminal proceedings,

nor to aid in the detection or conviction of offenders against the criminal laws of the state, unless such duty is imposed by the statute. That duty rests, primarily, on the state. There is no statute which expressly or by necessary implication imposes upon towns any duty in respect to the arrest and conviction of persons who remove or disinter a dead body without authority, nor that makes it the duty of towns to procure the return of bodies thus removed. The purposes for which money belonging to a town may be expended are defined, in a great measure at least, by statute, and the expenditure must be for some legitimate purpose connected with the town government, unless its expenditure for a different purpose is authorized by the statute. The only means a town has for paying a reward for the arrest and conviction of a person charged with a commission of a crime is by taxation; and the inhabitants of one town, as distinguished from the inhabitants of the state, have no such special interest in such an arrest and conviction as will empower a town, in the absence of a statute authorizing or imposing it, to incur such expense.

Same—Same—Same.

V. S. § 3083, authorizes towns to vote such sums of money as deemed necessary for the support of the poor, for laying out and repairing highways, for the prosecution and defense of the common rights and interests of the inhabitants, and for other incidental town expenses. This section confers no authority upon the defendant town to raise money for the enforcement of the criminal laws of the state, in the enforcement of which no duty is imposed upon the defendant town, and in which the inhabitants of every other town in the state have, in contemplation of law, the same interest as the inhabitants of the defendant town; and no power can be implied which does not pertain to matters of a local character, and relate to the prosecution and defense of the common rights and interests of the inhabitants of the town, as distinguished from the individual and the inhabitants of the entire state. As we have seen, the state has not placed the prosecution of persons

Construction of Statute.

violating the statute relating to the disinterment of dead bodies without authority, within the corporate limits of the defendant town, under the control and jurisdiction of the defendant town in its corporate capacity. This duty rests upon the state, and the burden is borne by all the inhabitants of the state; and the state has not imposed any duty upon the defendant town to procure the return of a body that has been removed from its burial ground without authority. Therefore it had no power to raise money, by vote or otherwise, to defray the expense of procuring the arrest and conviction of persons violating the statute which prohibits the removal or disinterment of a dead body without authority, or to pay for the return of a body that has been taken away from the place of its interment; nor could it make an enforceable contract respecting such matters. It could bind itself by contract only in respect to those matters which had been placed under its jurisdiction by statute or by usage, and in respect to which it could vote and raise money. It could not vote a tax to raise money to prosecute a criminal cause over which, in its corporate capacity, it had no jurisdiction, and in respect to which it owed no duty, nor for the return of a human body that, as a corporation, it was under no duty to procure returned. The inhabitants of the defendant town, in common with all the inhabitants of the state, might wish to have offenders against the statute punished, and the body returned to the place of its interment; but the defendant, in its corporate capacity, had no wish or interest. It had no duty to perform, no rights to defend, no interest to protect, no corporate or pecuniary concern in the subject-matter, and could incur no liability respecting the same. In Sheldon *v.* Town of Bennington, 67 Vt. 580, 32 Atl. 497, it is held that, when a municipal corporation has no interest in the event of a suit, or in the question involved in the case, and the judgment thereon can in no way affect the corporate rights or corporate property, it cannot assume the defense of the suit, or appropriate its money to pay a judgment

therein; and warrants or orders for the payment of money based upon such a consideration are void.

The selectmen of the town of Norwich did not incur a personal liability by causing to be posted a notice that the town would pay $1,000 for the purposes therein stated. The plaintiff, in performing the service for which he claims to recover, was bound to know whether the town could bind itself by contract to pay for such service; and, inasmuch as it could not, the case does not fall within the rule that an agent is personally liable when he fails to bind his principal for want of authority. If the town had directed the selectmen to offer the reward in its name, the plaintiff would have been no better off. He could not have recovered. Therefore he loses nothing by reason of want of authority in the selectmen to bind their principal. In Taft *v.* Town of Pittsford 28 Vt. 286, it is held that the plaintiff, making a contract with a public board of officers, is bound to know how far the powers of such officers are limited, and in what event they cease, and their work is stayed, and to understand that his contract with them will be subject to such limitations and restrictions as the general public statutes of the state impose upon the subject-matter. The case of Clay *v.* Wright, 44 Vt. 538, was an action to charge a town agent, and the court, in the course of the opinion, said: "It cannot be said in this case that the defendant bound himself by the promise, because he failed thereby to bind his principal; for the plaintiff knew he was the town agent, and was bound to know that he had no legal authority to do so, and would not have been justified in relying upon such an undertaking, or entertaining any such expectation that the town was thereby bound." Huthsing *v.* Bousquet, 2 McCrary, 152, 7 Fed. 833, was an action to recover a reward offered by the supervisors of a county for the arrest and conviction of thieves who had robbed the treasury of the county, and for the recovery of the money; and the plaintiff sought to charge the supervisors personally on the ground that, not binding their

Ultra Vires—Personal Liability of Officers.

principal, they bound themselves. The court, in holding that the supervisors were not liable, said: "The case stands upon this principle: The board of supervisors had no authority by law to make the contract on which the plaintiff relies in this action. The plaintiff was bound to know the law, and we must proceed upon the assumption that he did, when he accepted the offer and performed the services. The offer was *ultra vires*. The plaintiff knew it, it was his own folly to accept such an offer, and the court could not relieve him."

Judgment affirmed.

NOTES.

Municipalities—Rewards for the Arrest of Criminals.—In the absence of express statutory authority, municipalities cannot legally offer rewards for the apprehension of offenders against the criminal laws of the state. Loveland *v.* Detroit, 41 Mich. 367; Gale *v.* Inhabitants of South Berwick, 51 Me. 174; Hanger *v.* Des Moines, 52 Iowa 193, 35 Am. Rep. 266; Huthsing *v.* Bousquet, 3 McCrary (U. S.) 152; Patton *v.* Stephens, 14 Bush (Ky.) 324; Murphy *v.* Jacksonville, 18 Fla. 318, 43 Am. Rep. 323; Grant Co. Commrs. *v.* Bradford, 72 Ind. 455, 37 Am. Rep. 174.

Contra.—Borough of York *v.* Forscht, 23 Pa. St. 391; St. of 1840, ch. 75; Crawshaw *v.* Roxbury, 7 Gray (Mass.) 374.

Ultra Vires Contracts—Liability of Municipalities.—See Holder *v.* City of Yonkers (N. Y.), *ante* 164, and extensive *note*, 167, *et seq.*

Municipal Officers—Personal Liability.—See where the officers of a public or municipal corporation contract officially under an innocent mistake of the law, and the other contracting party has equal opportunities of knowledge, and neither party at the time look to personal liability, the officers are not personally liable. Boardman *v.* Hayne, 29 Iowa, 339; Duncan *v.* Niles, 32 Ill. 532; Ogden *v.* Raymond, 22 Conn. 379; Dameron *v.* Irwin, 8 Ire. Law (N. C.), 421; Hite *v.* Goodman, 1 Dev. & Bat. Eq. (N. C.) 364; Ives *v.* Hulet, 12 Vt. 314; Stone *v.* Huggins, 28 Vt. 617; Tucker *v.* Justices, 13 Ire. Law (N. C.) 434; Dey *v.* Lee, 4 Jones (Law), 238; Tucker *v.* Shorter, 17 Ga. 620; Copes *v.* Mathews, 10 Sm. & Marsh. (18 Miss.) 398; Hall *v.* Cockrell, 28 Ala. 507.

Contra.—In Lee *v.* Flemingsburg, 7 Dana (Ky.) 29, the court said it would not go into the question of the authority of the trustees to bind their corporate fund by an offer of a reward, because they

would, perhaps, be personally liable if they made a contract they had no authority to make.

Where the selectmen of a town only had authority to offer a reward of $500, and offered one of $2,500, they were held personally liable, although they signed the offer with the addition to their signature of the word "Selectmen of Milton." Brown *v.* Bradlee (Mass. 1892), 30 N. E. Rep. 85. And where the mayor of a city, without authority, officially offered a reward for the apprehension of a fugitive municipal officer, he was held personally liable, since the doctrine that an agent who exceeds his authority binds himself personally is applicable to public agents in New Jersey. Tinken *v.* Tallmadge (N. J. 1891), 22 Atl. Rep. 996.

PEOPLE *ex rel.* MAYNARD, ATTY. GEN.,

v.

VILLAGE OF HOLLY.

(*Supreme Court of Michigan, April 4, 1899.*)

Conviction of Incendiaries—Power of Municipality to Offer Rewards.* —A municipality authorized to adopt ordinances and make other regulations for the safety and general welfare of its inhabitants may offer rewards to secure the conviction of incendiaries who have destroyed property within its limits.

APPEAL by complainant from Oakland county circuit court in chancery. *Affirmed.*

Davis & Bromley and *Sam J. Patterson*, for appellant.

Charles F. Collier (*Spaulding, Norton & Dooling*, of counsel), for appellee.

HOOKER, J. The village of Holly offered a reward for testimony that should secure the conviction of the persons who had set fire to certain buildings within its limits, and work was done upon the case by Sargeant and Green, and a deputy sheriff named Botsford. The reward seems to have been earned, and the council passed a resolution that unless,

*See Spafford *v.* Town of Norwich (Vt.), *ante*, and *note*.

within 10 days, the parties claiming the reward should agree to arbitrate the question of who was entitled to it, the village attorney should cause a bill of interpleader to be filed against them. Nothing was done, however, under this resolution, and some time afterwards the attorney general filed the bill in this cause to restrain the payment of the reward to the persons named, or any of them. Such persons were not made parties to the suit. A decree was made restraining payment until a judgment should be obtained against the village. The complainant has appealed, and claims that the decree should have allowed a perpetual and unqualified injunction against the payment of the money. As the village has not appealed, we must assume that it is satisfied with the decree, and the only question before us is whether the complainant was entitled to a broader decree.

Holly was incorporated under the general law for the incorporation of villages, which authorizes it to provide for the preservation of public property, and to adopt ordinances and make other regulations for the safety and general welfare of the inhabitants, not inconsistent with the general laws of the state. The authorities are not harmonious upon the subject of rewards. The Massachusetts courts seem to recognize the existence of an implied power to offer rewards for the apprehension of incendiaries who have destroyed property within the city, from what is called the "general welfare clause." Shute *v.* Taylor, 5 Metc. (Mass.) 61; Loring *v.* City of Boston, 7 Metc. (Mass.) 411; Mead *v.* City of Boston, 3 Cush. 406; Crawshaw *v.* Roxbury, 7 Gray, 374; Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85. In New Hampshire the authority is expressly conferred. See Janvrin *v.* Town of Exeter, 48 N. H. 83. In Pennsylvania, municipalities have the authority to offer rewards in such emergencies. Shaub *v.* City of Lancaster, 156 Pa. St. 366, 26 Atl. 1067; Borough of York *v.* Forscht, 23 Pa. St. 391. 2 Bac. Abr. 147, supports the doctrine that the power to prevent fires is incidental to all municipalities; while Mr. Dillon says: "The governing body of a municipal corporation (which has ex-

press power to protect the property and promote the welfare of its inhabitants) may, it has been held, offer a reward for the detection of offenders against the general safety of its people, as, for instance, those guilty of the crime of arson within its corporate limits. The contrary doctrine has also been held." The California supreme court is said to uphold the power, but we are unable to verify it from the citation given. Some of the states deny it. The latest case seems that of City of Winchester *v.* Redmond (Va.) 25 S. E. 1001, where authorities supporting it are collected. Of these some apply to other offenses, the commission of which affects the inhabitants of the city only in common with those of the state outside of the city. Thus, in Baker *v.* City of Washington, 7 D. C. 134, it was held that the defendant had not authority to offer a reward for the capture of the slayer of President Lincoln. A similar case, involving a reward for murder, is that of Gale *v.* Inhabitants of South Berwick, 51 Me. 174. Patton *v.* Stephens, 14 Bush, 326, applied the same rule to a reward offered for the apprehension of one who, through forgery, had embezzled the city funds. The case of Hanger *v.* City of Des Moines, 52 Iowa, 193, 2 N. W. 1105, was another case of reward for the detection of a murderer. Butler *v.* City of Milwaukee, 15 Wis. 551, was not a case of arson, and seems to be within the principle of the preceding cases. The rewards in all of these cases are open to the criticism that they were not offered to preserve the welfare of the inhabitants of the municipality, as contradistinguished from those of the general public. The case of Murphy *v.* City of Jacksonville, 18 Fla. 318, is not in point, because governed by a prohibitive statute, which, in the absence of a "general welfare clause" (which does not appear), is a sufficient reason for the decision. Crofut *v.* City of Danbury, 65 Conn. 298, 32 Atl. 365, is in point, and supports City of Winchester *v.* Redmond.

The danger of conflagration in cities and villages necessitates preventive measures that are not common in sparsely-settled districts, and such municipalities are authorized to

expend large sums for apparatus to extinguish them. But these only serve to prevent the spread of fires. A determined incendiary in a city is a menace which cannot be safely disregarded, and may call for more than the ordinary methods to guard against his acts. We think the "general welfare clause" is sufficiently broad to cover the employment of private detectives, through rewards, in such emergencies. We consider its exercise as "contravening no provision of the constitution, * * * and made in the exercise of the police power necessary to the safety of the city," and, we may add, impliedly conferred upon it. See Baumgartner *v.* Hasty, 100 Ind. 580. The decree is affirmed, with costs. The other justices concurred.

PEOPLE

v.

BLOM.

(*Supreme Court of Michigan, April 18, 1899.*)

Liquor Licenses—Partial Prohibition—Validity of Ordinance.*—A municipality, under a statute authorizing it to prohibit or suppress, or regulate or license, the sale of intoxicating liquors, may impose such a license tax, as a condition precedent to the right to keep a liquor saloon within its limits, as will amount to a partial prohibition.

ERROR by defendant to Ottawa county circuit court. *Affirmed.*

McKnight & McKinght, for appellant.

Horace M. Oren, Atty. and Gen., and *George E. Kollen*, Pros. Atty., for the People.

MOORE, J. The respondent is a saloon keeper, whose sole and only business is selling intoxicating liquors at retail in the city of Holland. He paid the state tax to the county treasurer, and filed the bond required by the state law. The

*See note at end of case.

city of Holland, by ordinance, requires a person, before engaging in the business of keeping a saloon, to pay a tax of $300, and to comply with certain other conditions. The respondent refused to pay this tax. He was convicted of a violation of the ordinance, and has brought the case here by appeal.

The authority for the passage of the ordinance is in title 7 of the charter. Section 1. of this title reads as follows: "The city of Holland, in addition to such other powers as are conferred by this act, shall have the following general powers and authority, and the common council of said city may enact, make, continue, establish, modify, amend and repeal such ordinances, by-laws and regulations in relation thereto, and for the exercise of the same, as they may deem desirable." Subdivision 7 gives the council authority to prohibit and suppress ale, beer, and porter houses, and all places of resort for tipplers and intemperance, and to punish the keepers thereof and all persons assisting in carrying on the business thereof. Subdivision 14 authorizes the council to regulate and license all taverns, hotels, and houses of public entertainment, all saloons, restaurants, and eating houses, and all places where tobaccos, cigars, and any beverages are kept for sale. The ordinance itself is as follows:

"An ordinance relating to saloons and saloon keepers.

"The city of Holland ordains:

"Section 1. No person shall keep a saloon within the limits of the city without having first obtained from the common council a license therefor, in the manner hereinafter provided.

"Sec. 2. Every person desiring to keep a saloon within the city, shall before entering upon such business, make application in writing therefor to the common council, specifying the location of the building in which he intends to keep the same, which location shall be either on Eighth street between Land street and River street, or on River street between Sixth street and Tenth street, and in case of a firm, such application shall set forth all the names of the parties constituting such firm, which application shall also designate

the persons proposed as sureties on the bond as hereinafter provided. Such application shall be accompanied by a recommendation signed by at least six reputable citizens showing that the applicant is well known to them and is of good reputation.

"Sec. 3. After the granting of such application by the common council and before issuing the license, the applicant shall pay into the city treasury such sum of money for said license as shall annually be fixed by resolution of the common council, and shall file the city treasurer's receipt therefor with the city clerk. Said sum of money shall not be less than three hundred dollars, nor more than five hundred dollars. Such applicant shall also before such license is issued to him execute a bond to the city of Holland in the sum of two thousand dollars with two sufficient sureties to be approved by the common council, conditioned that he shall keep and maintain an orderly and well regulated saloon during the continuance of such license, and shall pay all fines and costs imposed upon him for the violation of any of the provisions of this ordinance."

The record shows that Holland is a city of about 8,000 people. It has, including defendant's saloon, eight saloons where liquor is sold. Its police force is maintained at an expense of about $1,000. It has had about the same number of saloons as now for several years. There is but one other saloon within 10 miles.

The respondent, in his brief, alleges five reasons why the ordinance in question is invalid, as follows: (1) It is unreasonable, oppressive, prohibitory, and in restraint of trade; (2) it usurps the functions that are exercised by the general laws of the state; (3) the ordinance attempts to collect revenue, instead of regulating and controlling the business; (4) the amount of the license fee is not definitely fixed by the ordinance; (5) the charter nowhere gives the city of Holland authority to license saloons where intoxicating liquors are sold. The validity of ordinances of like character, and involving the same principles, is sustained in the

following cases: Kitson *v.* City of Ann Arbor, 26 Mich. 324; Wolf *v.* City of Lansing, 53 Mich. 367, 19 N. W. 38; Sherlock *v.* Stuart, 96 Mich. 193, 55 N. W. 845. See, also, Adams *v.* Mayor, etc., 2 Head, 363; Smith *v.* Mayor, etc., 3 Head, 245; Burch *v.* Mayor, etc., 42 Ga. 596; Harbaugh *v.* City of Monmouth, 74 Ill. 367; Dill. Mun. Corp. §§ 327, 328, and notes; 11 Am. & Eng. Enc. Law, 667, 668, and notes; City of Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29; Black, Intox. Liq. §§ 31, 46. Judgment is affirmed. The other justices concurred.

NOTE.

Intoxicating Liquors—Ordinances—Partial Prohibition.—Where the municipal charter contains a general power to prohibit the sale of intoxicating liquors, an ordinance may be adopted for partial prohibition. Goddard *v.* Jacksonville, 15 Ill. 588; Byers *v.* Olney, 16 Ill. 35; Pekin *v.* Smelzel, 21 Ill. 464; Kettering *v.* Jacksonville, 50 Ill. 39; Schwuchow *v.* Chicago, 68 Ill. 444; Harbaugh *v.* Monmouth, 74 Ill. 371; Martin *v.* People, 88 Ill. 390; Gunassohn *v.* Sterling, 92 Ill. 569.

In re COLE'S ESTATE.

MULBERGER

v.

BEURHAUS *et al.*

(*Supreme Court of Wisconsin, Jan. 31, 1899.*)

Officers Neglecting Duties—Rights of Taxpayers.*—When the officers of a public corporation, upon whom the duty devolves of appealing to the courts to protect its rights, refuse to put the necessary judicial machinery in motion upon demand being made therefor by a taxpaying member of such corporation acting for himself and all other such persons, or the circumstances are such as to obviously render such demand useless, such taxpayer may, so acting, take the place of such public officers for the purpose of enforcing the corporate rights.

*See generally 2 Dill. Mun. Corp. (4th Ed.) § 915.

In re Cole's Estate

Same—Same.—If a public corporation be aggrieved by a determination of a county court as to a matter pending before it, and the proper officers of such corporation refuse or neglect to appeal from such determination to the circuit court for relief, a taxpaying member of such corporation, acting as before indicated, may intervene and take the appeal.

Same—Same.—The test of the right of appeal in the circumstances stated above is not whether the taxpayer is directly injured by the determination of the county court, but whether the corporation as a whole is injured or aggrieved in a matter in which the individual members of the corporation have a substantial interest.

Trust Estates—Use of Principal for Repairs.—If property consisting of real estate be by will conveyed to trustees to hold for the life of certain persons in being therein named, the income therefrom to be used so far as necessary to keep the property in repair and pay the taxes and insurance, and the balance to be paid to those having the life interest during the continuation of their lives, and the corpus of the property to be, at the termination of the life interest, conveyed to a municipal corporation for purposes for which it may legally hold and devote it, and there be ample income from such property to preserve it for the ultimate purpose named in the will, and there be no express power in the will for the trustees to make permanent repairs or improvements on the property out of the corpus thereof, only the income can be devoted to that purpose.

Same—Same—Effect of Consent by City as Remainder-man.—In the circumstances mentioned in the foregoing, the trustees of the trust, even with the consent of those having the life interest and the municipality entitled to the property ultimately, have no right to devote any part of the principal of the trust estate to the making of betterments or permanent improvements.

Action to Enforce Trust—Costs.—In an action to enforce a trust, or concerning its administration, the subject of costs is regulated wholly by statute. All costs and counsel fees as well, for which the trustees would otherwise be liable, are chargeable to the trust property or income thereof in the absence of some direction to the contrary based on bad faith on the part of the trustees. The court has no authority, independent of a statute on the subject, to direct the payment of costs or counsel fees out of the trust fund, except such taxable costs as the trustees would otherwise be compelled to pay personally.

(Syllabus by the Judge.)

APPEAL by executors from Jefferson county circuit court. *Affirmed.*

In re Cole's Estate

Case Stated.

John W. Cole died testate February 17, 1894. By his will he bequeathed to three executors named the bulk of his property in trust, to manage and control the same during the life of his wife, Eliza Cole, to keep all the buildings insured and in a proper state of repair, to collect all rent and other revenues of the estate, to disburse the same by paying for all repairs, insurance, taxes and expenses of administering the trust, and by paying the residue to the wife and son in certain proportions indicated, during the lifetime of both, and the whole to the survivor during his or her life; and at the death of the wife and son the entire trust estate received by the trustees under the will was directed to be conveyed to the city of Watertown in trust for the establishment and maintenance of a public library and business men's club room, and a home for aged and poor people of the city. One of the executors named refused to serve, and one died in the lifetime of the testator. Such proceedings were had that the defendants were duly appointed as trustees and executors, and prior to October 28, 1897, they duly completed the settlement of the estate as to the usual probate proceedings. Before the testator died he commenced making some repairs and changes of some business buildings covered by the bequests, which repairs were continued to completion, and other repairs and changes in the property bequeathed were made by the trustees, which, in effect, modernized two of such buildings by putting in new fronts and otherwise making them more desirable as rentable property. A barn was also reconstructed, and some expenditures were made on a farm by way of making a well and erecting a windmill. On the 10th day of June, 1897, a detailed statement of receipts and disbursements made on account of the property was filed, whereby it appeared that several thousand dollars of income had been received in excess of the amount paid out for repairs and improvements. All such repairs and improvements were charged against the income, and also $2,164.97 paid to the wife and son, and there was yet left in the hands of the trustees a balance of $1,084.48.

Subsequent to the filing of such statement the trustees represented to the common council of the city of Watertown that they were entitled to be reimbursed out of the estate for expenditures charged against the income for improvements on the property and other expenditures. The result was that an agreement was made between such trustees and the city council, to the effect that a portion of the trust estate known as the "homestead" should be sold, and the proceeds used to reimburse the former for money paid out by them for funeral expenses, debts and taxes due at the death of the testator, and for permanent improvements made, or that might be made, on the property. Such proceedings were thereafter had that the homestead was sold under an order of the county court, the proceeds to be applied according to the subsequent order of the court. Thereafter on the 28th day of October, 1897, defendants made a final report as executors, of the expenses incurred in the settlement of the estate, showing a balance of $1,791.21 due them. They also filed a detailed statement of what they called "permanent improvements" on the real estate, as follows: On the Cole Block, $1, 225.99; on the homestead, $146.58; on the Harvey Block $2,184.98; on the barn, $316.02; on the farm, $205.50, —the same being identical with the expenditures paid out of the income according to the statements filed in June. They also filed a statement of expenses of the sale of the homestead, amounting to $35, the entire account aggregating $4,114.07. Against that they credited the receipts from the sale of the homestead, leaving a balance due them of $114.07 A hearing was had on the accounts as so made up, at which a citizen and taxpayer of the city, the respondent herein, on behalf of himself and all others similarly interested, filed objections upon the ground that no authority existed for the making of permanent improvements on the trust property, and that none of the items in either of the accounts were for such improvements, and that no part of the proceeds of the homestead could properly be applied in payment of either of the executor's accounts for the settlement of the estate, or for

the so-called improvements upon the property. A hearing was had on such objections with the result that the court, by order, determined that the account for the amount due the executors, of $1,791. 21, was payable out of the property of the testator not disposed of by his will; that no part of the proceeds of the homestead could be used to reimburse the executors for expenditures upon the trust property in excess of such as constituted permanent improvements strictly so called; that it was impossible to determine the amount expended for such improvements with exactness but that there should be allowed on that account the $316.02 paid out on the barn, $940.32 on the two business blocks, and $35 for expenses of making the sale of the homestead, in all $1,291.34. The objecting tax payer, appellant herein, in the capacity in which he filed his objections, appealed from the determination of the county court to the circuit court. In the circuit court the trustees moved for a dismissal of the appeal upon the ground that the appellant had no appealable interest. The motion was denied. The result of the hearing on appeal was a judgment that the agreement between the city of Watertown and the defendants for a sale of the homestead, and reimbursement of the trustees out of the proceeds, for money laid out and expended by them on the trust property, was void, and that the whole of such proceeds, $1,000, belonged to the trust estate to be invested for the benefit of Mrs. Cole and her son Oscar during their lives, and thereafter to be paid over to the city of Watertown in trust for the purposes mentioned in the will of John W. Cole. From that judgment defendants appealed.

L. B. Caswell and *W. H. Rogers*, for appellants.

Harlow Pease, for respondent.

MARSHALL, J. (after stating the facts). Appellants contend that respondent had no right to take the appeal from the county court to the circuit court, and that the latter erred is not dismissing it on appellants' motion. The statute (section 4031, Rev. St.) is referred to, giving the right of appeal in

Officers Neglecting Duties—Rights of Taxpayers.

such cases only to the party aggrieved, and numerous cases are cited to the effect that only persons having a substantial or pecuniary interest in the matter is a party aggrieved within the meaning of the statute. It is unnecessary to discuss that question at any considerable length. It is sufficient to refer to the reasoning in many cases recently decided by this court as to the right of a taxpayer to enforce the cause of action of a public corporation of which he is a member when its officers neglect or refuse to perform their duty. Quaw *v.* Paff, 98 Wis. 586, 74 N. W. 369; Frederick *v.* Douglas Co., 96 Wis. 411, 71 N. W. 798; Lumber Co. *v.* McIntyre (Wis.) 75 N. W. 964, 969; Rice *v.* City of Milwaukee (Wis.) 76 N. W. 341; Webster *v.* Douglas Co. (Wis.; decided January 10, 1895) 77 N. W. 885. The direct injury to be remedied where the taxpayer intervenes and sets the judicial machinery in motion for that purpose, is not personal and direct to himself, but to the corporation. The question is, are the members of the corporation as a whole aggrieved? If so, other than that justice shall fail, the court will take jurisdiction of the subject of controversy at the instance of a taxpayer. The fact that the threatened injury or the wrong done is to the corporation, and that its governing body or officers, who should move in the matter, neglect or refuse to do so, creates a necessity for some other way to remedy the mischief, and in that situation the circumstance of a person being a taxpayer and interested in the protection of its rights, is a sufficient test of his competency to challenge the threatened wrong, or wrong actually done, in a court of justice. That jurisdiction of the court is the most powerful and effective force to prevent and redress wrongs to public corporations when their officers squander public money, or improperly surrender or violate public rights, either corruptly or ignorantly. There is no other way to successfully and efficiently meet that situation. In such cases, where officers neglect to do their duty, the wrong need not by any means go unre-

Same—Same.

dressed, so long as there is a single taxpayer with courage and public spirit enough to set the judicial machinery in motion. He may stand in court in place of the unfaithful public officials. The court, in him, will recognize the interests of the corporation as a whole, and with the evidence produced before it, calling for action, by its decree, compel the performance of duty by all within its reach. No man or set of men can wrong a public corporation in Wisconsin and defy its members, by means of sustaining such relations with the individuals of its governing body, as to deter them from properly protecting the public rights, or their failing to do it from any other cause. Such has been found to be the situation in some states at some times, as indicated in Lumber Co. *v.* McIntyre, *supra*, but not here. The subject is not governed by any statute, or necessarily by precedent. As said in the case cited, the power of a court of equity, which is the jurisdiction invoked by the taxpayer, is broad enough to fit all situations where, to effect justice, a remedy is required. While it is guided by precedents it is not governed by them, but may meet new situations as they arise, so that, in the race between it and wrong doing by public servants in the handling of the financial affairs of the municipality, the way is open and the means ample to secure the prevalence of justice over wrong. It will not be questioned but that the city of Watertown could have appealed from the action of the county court. That being the case, the taxpayer, within all the decisions of this court, had a sufficient interest in maintaining the corporate rights to enable him to intervene and take the appeal when the corporation would not proceed in the proper way to protect its rights.

Same—Same.

The remaining question to be determined is, did the trial court rightly decide that the entire expenditures made by the trustees upon the trust property were chargeable to the income therefrom? That must be answered in the affirmative, and independently of whether the decision was strictly right as to the expenditures

Trust Estates—Use of Principal for Repairs.

being all for repairs strictly so called or not. As to that, however, we see no reason for disturbing the decision of the trial court. The will clearly indicates that the entire estate received from the testator was intended by him ultimately to be conveyed to the city of Watertown for the purposes indicated therein. It devoted the income to the payment of all repairs on the buildings, and said that all of the property which came to the possession of the trustees shall at the end be conveyed to the city. There is no special power given to do anything to the buildings except to keep them in repair. As a general rule, without such special power trustees cannot exercise it at all. Perry, Trusts, § 526; Lewis, Trusts, § 576; Beach, Trusts, § 626, and cases cited to text in each. Beach states the rule thus: "Subject to certain modifications it is the rule that where real estate is conveyed to trustees in trust for a tenant for life, with remainder over, the trustees have no power to raise money out of the corpus of the estate for the purpose of making substantial and permanent repairs, either on the buildings or on the land. Such expenses, if incurred, will be a charge on the interest of the tenant for life." Nairn *v.* Marjoribanks, 3 Russ. 582, is instanced to support the text, where LORD ELDON said, that even if the master should report that it would be for the benefit of all parties interested that the improvements should be made, he would not confirm the report. Some exceptions to the extreme rule stated are found in some modern decisions, in cases where the control of the property given to the trustees was of such a nature as to include by implication expenses for the work of permanent improvements, or where it was necessary to make such improvements in order to preserve the property and make it tenantable, and there was no other way of raising the necessary money to do it; but no case can be found sanctioning improvements to property at the expense of the remainder-man where power to do so is not given by the instrument creating the trust, either expressly or impliedly, or where the income from the property is ample to meet all such expenditures. In Peirce *v.*

Burroughs, 58 N. H. 302, the general rule is stated thus: "The preservation of the capital without expense to the remainder-man is as much his right as the use of the property without payment of rent is the right of the tenant for life; the measure of the latter is the net income for life." Cogswell *v.* Cogswell, 2 Edw. Ch. 231, is a further good illustration of the rigorous adherence to that rule by courts of equity. There a portion of the trust property consisted of buildings in such a condition as to yield but very little income, and the court said that did not justify the making of permanent improvements at the expense of the trust property, the testator having given no directions in that regard in his will. That applies very clearly to the will before us. The testator indicated clearly, as before stated, that the buildings on the property were to be put in repair, and kept in repair, out of the income till the expiration of the life interest of the wife and son, and then that the property, unimpaired as it came to the trustees, except that the character of investments might be changed under the terms of the will not material to this discussion, should be conveyed to the city of Watertown. There is no power in the trustees to change the plain scheme of the will, no power in the court to authorize any such change, and no power in the city of Watertown to vary it in any manner. As the testator's scheme was worked out and inscribed in the will, so must it be. The trustees must carry out that to the letter, and at the end, the city of Watertown must take the estate for the purposes indicated in the will, or reject it.

Same—Same—Effect of Consent by City as Remainder-man.

It follows, as the learned trial court decided, that the agreement made by the council of the city of Watertown for the reimbursement of the trustees out of the trust estate for expenditures made by them upon the property, was *ultra vires* and totally so, and as said before, without regard to whether such expenditures were in part for permanent improvements, strictly so called, though we are inclined to say, as did the trial court, that they were all repairs within the language of the will expressly directing the application of the income of

the property, so far as necessary, to the payment of all expenditures necessary to keep such buildings in a proper state of repair. That certainly includes all reasonable charges necessary to make the structures desirable as rentable property.

There is no other question that requires consideration. Some suggestion was made on the argument as to the right of the parties to have costs and counsel fees out of the estate, and as to directions for the court below to make a proper allowance for such counsel fees. It is considered that the subject of taxable costs, strictly so called, in a case like this, is wholly regulated by statute. The court below has discretionary power to allow or withhold costs as justice seems to require. If allowed against the trustees they are payable out of the trust fund unless the court otherwise directs because of bad faith on the part of such trustees. Rev. St. § 2932. That applies to all courts and to the reasonable counsel fees of the trustees as well as taxable costs, the latter meaning costs taxed according to the statutory fee bill. In this connection, as to the appeal to this court, we are unable to say that the appellant trustees have been guilty of such bad faith as should subject them, personally, to the expenses of such appeal. Their costs and expenses here, therefore, will be paid from the trust fund, but from that part represented by the income. Whether their expenses, including counsel fees of the litigation below, shall be likewise paid, is a matter that will be left to the court that shall further superintend the administration of the trust. In regard to granting counsel fees to the respondent, or giving directions to the lower court to do so, payable out of the trust fund, that is quite another question. There is no statute authorizing such a proceeding and no precedent for it in this court. The counsel fees of trustees, acting in good faith, and costs taxed against them as well, were always payable out of the trust fund, because of the injustice of making them bear the expense, personally, of matters done honestly, in a representa-

Action to Enforce Trusts—Costs.

tive capacity. But it is considered that counsel fees to others that may be interested in the trust fund are not recoverable, either from the trustees personally or out of such fund. That was the rule in chancery before the Code, and there is no statute changing it, nor any precedent varying the old practice. Rose *v.* Association, 28 N. Y. 184; Downing *v.* Marshall, 37 N. Y. 380; Devin *v.* Patchin, 26 N. Y. 441; Lee *v.* Lee, 39 Barb. 172; Pars. Costs, p. 132. There are cases in this court for the construction of wills, and contests as to the validity of wills, where a different rule has been adopted, which we need not review here. It does not apply to this case.

An examination of respondent's brief satisfies us that there is much unnecessary matter in it. Costs for that we limit to $35.

The judgment of the circuit court is affirmed, costs to be taxed and paid as indicated.

STATE (HARDY, PROSECUTOR)

v.

CITY OF ORANGE.

(*Court of Errors and Appeals of New Jersey, Feb. 17, 1899.*)

Municipal Officers—Constitutionality of Veteran Act.—The act of March 31, 1897, entitled "An act respecting the employment of honorably discharged Union soldiers, sailors and marines in the public service of the state of New Jersey, relative to removals," is unconstitutional so far as it attempts to regulate public offices or positions in the several cities, counties, towns, or villages of the state.

Same—Removal.*—The appointment for a specified time to a position in the municipal service, the term of which is not fixed by law, and the acceptance of such appointment, constitutes a contract between the municipality and its appointee, the terms of which are binding upon both of the parties to it.

*See note at end of case.

State (Hardy, Prosecutor) *v.* City of Orange

Waiver.—The statutes of this state commonly known as the "Veteran Acts" were passed solely for the benefit of the class of persons named therein, and their provisions may be waived by the beneficiaries thereof.

DIXON, LUDLOW, COLLINS, BOGERT, ADAMS, and HENDRICKSON, JJ., dissenting.

(Syllabus by the Court.)

ERROR by plaintiff to supreme court. *Affirmed.*

Joseph A. Beecher, for plaintiff in error.

Edw. M. Colie and *Thomas A. Davis*, for defendant in error.

GUMMERE, J. This writ of error brings up the judgment of the supreme court dismissing a writ of *certiorari* allowed on behalf of Frank Hardy to review the following resolution of the common council of the city of Orange, passed July 12, 1897: "Resolved, by the common council of the city of Orange, that George W. Gray be, and he is hereby, appointed keeper of the reservoir for three years from August 1, 1897, to succeed Frank Hardy, whose term expired June 1, 1897." Hardy, the prosecutor, who is an honorably discharged Union soldier, was appointed keeper of the reservoir of the city of Orange on June 1, 1896, for the period of one year from that date, at an annual salary of $540; and the *certiorari* was allowed him for the purpose of testing the validity of his claim to hold his position during good behavior, notwithstanding the fact that his appointment was only for the period of a year, which had expired prior to the passage of the resolution which he seeks to have declared void. His claim is based upon what are commonly designated the "Veteran Acts" of 1895 and 1897. The act of 1897 (P. L. 1897, p. 142) is entitled "An act respecting the employment of honorably discharged Union soldiers, sailors and marines in the public service of the state of New Jersey, relative to removals." The body of the act declares that no person holding a position by appointment or employment in the state of New Jersey, or of the several cities, counties, towns,

Case Stated.

Municipal Officers—Constitutionality of Veteran Act.

State (Hardy, Prosecutor) *v.* City of Orange

or villages thereof, who is an honorably discharged Union soldier, sailor, or marine, shall be removed from such position or employment except for incompetency. That the object of this act, so far as it relates to the holding of positions by appointment or employment in the various cities, counties, towns, or villages of the state, is not expressed in its title, is manifest. So far, therefore, as the act legislates with regard to those positions, it clearly contravenes article 4, § 7, par. 4, of our state constitution, which requires that "every law shall embrace but one object, and that shall be expressed in the title." The act of 1897 affords no support for the prosecutor's claim.

The veteran act of 1895 (P. L. 1895, p. 317), however, contains no provisions which are antagonistic to our constitution. Francis *v.* City of Newark (Err. & App.; March term, 1897), 42 Atl.—. That act declares that any honorably discharged Union soldier or sailor who holds a position or office under the government of this state, or of any city or county therein, whose term of office is not fixed by law, shall not be removed from such position or office except for good cause shown, and after a fair hearing, but shall continue to hold such position or office during good behavior. The argument in support of the contention of the prosecutor is that, by virtue of the provisions of this act, every office or position under the government of this state, or of any city or county thereof, when occupied by persons of the character described in the statute, is held, either for a term fixed by act of the legislature, or else during the good behavior of the incumbent; and that, where the term of office is not fixed by the legislature, the appointing power cannot set bounds to the duration of the incumbency by making appointments for a specific term. It will be perceived that in this argument the phrase, "not fixed by law," is assumed to be equivalent to not fixed by an act of the legislature. But the statute deals not only with offices and positions created by the legislature of the state, but also with those created by the legislative bodies of counties and cities; and there is much

force in the insistment of counsel for the defendant in error that a municipal ordinance or resolution is just as much a "law," within the boundaries of the municipality, as is an act of the legislature within the boundaries of the state; and that a county or city office or position, created by, and whose term is fixed by, municipal ordinance or resolution, is just as much an office or position whose term is fixed by law as is a state office or position which is created by, and whose term is fixed by, the legislature. But it is not necessary, for the disposition of this case, to determine the scope to be given to the phrase, "not fixed by law." The act of 1895, although it ordains that a veteran Union soldier or sailor, when appointed to a municipal position, the term of which is not fixed by law, shall hold it during good behavior, does not preclude the appointing power from limiting the duration of the incumbency by making the appointment for a fixed period. The appointment for a specified time to a position in the municipal service, whose term is not fixed by law, and the acceptance of such appointment, constitute a contract between the municipality and its appointee, the terms of which are binding upon both of the parties to it. Chase *v.* City of Lowell, 7 Gray, 33; Horan *v.* Board, 58 N. J. Law, 533, 33 Atl. 944. And there is nothing in the act of 1895 which prevents a veteran Union soldier or sailor from making such a contract, and being bound by its terms. That statute was passed solely for the benefit of the class of persons named in it, and it is entirely settled that a statute which confers merely a personal privilege or benefit may be waived by the beneficiary. Quick *v.* Corlies, 39 N. J. Law, 11; Fraley *v.* Feather, 46 N. J. Law, 429. The acceptance by Hardy, the prosecutor, of an appointment to the position of the keeper of the Orange reservoir for a period of one year from June 1, 1896 (assuming that it was a position whose term was not fixed by law), was a waiver of the benefits and privileges conferred upon him as a veteran Union soldier by the act of 1895, and at the expiration of the term fixed by

Same—Removal.

Waiver.

his contract with the city that position became vacant. The resolution of the common council of Orange on July 12, 1897, filling that vacancy, was, consequently, unobjectionable. The judgment of the supreme court should be affirmed, with costs.

DIXON, LUDLOW, COLLINS, BOGERT, ADAMS, and HENDRICKSON, JJ., dissenting.

NOTE.

Municipal Officers—Removal.—Where an officer of a municipal corporation is elected or appointed for a fixed term or during good behavior, he cannot be removed except for cause shown to be sufficient, and after notice and hearing. Madison *v.* Korbly, 32 Ind. 74; Hoboken *v.* Gear, 3 Dutch. (N. J.) 265; Stadler *v.* Detroit, 13 Mich. 346; Field *v.* Commonwealth, 32 Pa. St. 478; State *v.* Doherty, 25 La. Ann. 119; Commonwealth *v.* Sutherland, 3 S. & R. 145; Chicago *v.* Edwards, 58 Ill. 252; People *v.* Comptroller, etc., 20 Wend. (N. Y.) 595; Field *v.* Girard College, 54 Pa. St. 223; Langdon *v.* New York, 92 N. Y. 427; People *v.* The Comm'rs, 28 Hun (N. Y.) 495; Houseman *v.* Commonwealth, 100 Pa. St. 222; State *v.* Register, 59 Md. 283; Smith *v.* Brown, 59 Cal. 672.

DITTMAR

v.

CITY OF NEW BRAUNFELS.

(Court of Civil Appeals of Texas, Jan. 18, 1899.)

Water Supply—Refusal to Sign Agreement Releasing City from Liability.—A city cannot refuse to furnish a citizen a supply of water merely because the latter will not sign an agreement releasing the city from liability for any scarcity or failure of water or defect in the quality thereof.

Same—Same.—Nor can the city exact a higher water rate because of a refusal to sign such an agreement.

Refusal to Furnish Water—Remedies.*—Where a city refuses upon such grounds, to furnish water, there is no adequate remedy at law; and the citizen may seek relief in equity.

*See note at end of case.

Dittmar *v.* City of New Braunfels

APPEAL by plaintiff from Comal county district court. *Reversed.*

F. J. Maier, for appellant.

August Altgelt, *Clark & Ball*, and *J. D. Guinn*, for appellee.

FISHER, C. J. Appellant, Dittmar, brought this suit, in the nature of an injunction, to restrain the city of New Braunfels from interfering with his use of water from the water system of New Braunfels for domestic purposes, and to require the city to restore him to his rights as a consumer of water under a contract existing between him and the city, and to connect his residence with the water mains of the city, after the city authorities operating the waterworks, without his consent, had disconnected his residence from the water system, and cut off his supply of water. There is also a claim of damages claimed to have resulted by reason of the wrongful interference of the city with his rights in the use of water. A temporary injunction was granted, but, upon final hearing, general and special demurrers were addressed to the petition, which were sustained, and the case dismissed, from which judgment the appellant has appealed.

Case Stated.

Without stating in full the language of plaintiff's petition, the cause of action, as there set out, is substantially as follows: The city of New Braunfels is incorporated under the general laws of this state, and plaintiff is a resident and taxpayer thereof, occupying, with his family, a residence within the limits of the city. The city has in operation, and has had for several years past, a permanent and adequate system of waterworks, which is carried on and conducted by the city for the purpose of supplying the inhabitants water for public and private use. There is an abundant supply of pure and wholesome water, which the city, by the exercise of reasonable diligence in the operation of its waterworks, can continuously furnish the plaintiff and the other inhabitants of the city. This water is used for fire protection and

for domestic purposes by the inhabitants, and there is not, within the city, any other source from which the inhabitants can obtain a sufficient and wholesome supply of water. In November, 1895, the appellant entered into a contract with the city, whereby it agreed to furnish him water at his residence, for household purposes, at the rate of one dollar a month, payable quarterly in advance. In pursuance of that contract, at considerable expense to the plaintiff, the amount of which is set out in the petition, the plaintiff's residence was connected with the water system operated by the city, and he, from that time, had promptly paid the water rates due from him, and has complied with all reasonable regulations made by the city for the consumption and use of water; and if any water rent, upon the trial of the case, was found to be due, he was ready and willing to pay the same, and had tendered to the defendant all amounts due it for the use of water. In pursuance of said contract, he continued to use the water for household purposes, at his residence, until May, 1898, when the defendant, through its servants operating the water system, wrongfully, without his consent, cut off the supply of water from his residence; and thereupon he demanded of the defendant that he be again connected with the water system, and restored to his rights as a consumer, and tendered to the defendant the sum of $12, all of which the defendant refused to do. In 1897 the city passed an ordinance requiring consumers of water for household purposes to enter into a contract, which is styled in the petition as "Exhibit A," as follows: "$12.00. (Ord. Sec. 26.) New Braunfels, Texas, 1897. The city of New Braunfels is requested to connect my property known and described as lots Nos. 9 and 10, on Academy street, Jahn's addition, in ward No. 4, New Braunfels, Texas, with the waterworks system of said city. The water is wanted and applied and subscribed for under conditions, and for the purposes and uses, following: Household. It is especially agreed and understood, and made a part of the consideration of this contract, that the city of New Braunfels is in no manner to

be held liable for any scarcity or failure of water, nor for the quality or quantity thereof, nor for any failure to supply water in the event of fire on the premises, or other casualty or happening. This order is given and signed freely with the understanding and acquiescence of the terms and conditions above, and with the knowledge and the understanding that, if a contract is desired not containing such a waiver, a higher rate would be demanded by the city, and with the full knowledge and acquiescence of the ordinance of the said city exempting it from liability in the event of failure or scarcity of water, either for fire or domestic purposes. This contract is continuous, and the subscriber is aware of the condition that, should he desire to have the same altered, abated, or canceled, notice must be given to the city of New Braunfels at least 30 days beforehand; otherwise this contract is to remain in full force. But nothing herein shall be construed to prevent the city from cutting off the supply without notice or liability for damage of any kind, in the event the rate herein called for and specified is not promptly paid when due."

And at the same time the city passed the following ordinances, which are known as sections 27 and 29:

"Sec. 27. Any person, corporation or firm desiring a contract or form differing in its conditions from the order given in section 26 hereof, may, by application in writing to the city council of New Braunfels, Texas, have a special contract granted him (or it) at the rate to be fixed by such council, upon the granting of such application, which rate shall not be less than double the amount of the charges in the ordinances set out, except for good reasons to the contrary, shown to the city council."

"Sec. 29. No connections shall be made nor shall any water be furnished or supplied, unless the owner of the property to be so connected or supplied, make his application therefor in writing and form following, to wit: [Here follows the form Exhibit A, leaving blank the name, lot, street, etc., so as to constitute a printed blank form.]"

This ordinance, as stated in section 27, was intended to give those inhabitants the right to a supply of water who refused to sign and enter into the contract set out in Exhibit A. The plaintiff refused to sign the contract as previously set out, or any of the contracts required by the ordinance as stated in section 27, and for this reason, solely, the city disconnected him from the water system, and refused further to continue furnishing him a supply of water under the contract that he had previously entered into with the city in 1895. It is also averred that it cost the city no more to furnish plaintiff a supply of water for household purposes than it does other inhabitants of the city; that it is furnishing other inhabitants for household purposes a supply of water at the same rate that it agreed to furnish the plaintiff under the contract of 1895. In other words, that there are no dissimilar conditions existing between the plaintiff and the other inhabitants with reference to the cost and expense of furnishing water, and that the city is continuing to furnish other inhabitants an adequate and wholesome supply of water for household purposes at the rate of one dollar per month. The contention of the appellant is that the contract as stated in Exhibit A, and the ordinance upon which it is based, are unreasonable, and therefore void, and that for his refusal to enter into a contract of that nature the city arbitrarily, and without legal reason, cut off his supply of water and disconnected him from the system; that his rights as a consumer were fixed under the contract that he had entered into in 1895, which could not be disturbed, except for reasonable rules and regulations, which it is not questioned the city had the right to make, regarding the use and consumption of water. This court has previously held in the case of Lenzen *v.* City of New Braunfels, which will be found reported in 35 S. W. 341, that a city who by contract owes a duty to a consumer will be required to exercise ordinary care in furnishing and supplying him with the use of water. And the averments of the petition, in terms, state that the purpose of passing the ordinances which

are here assailed was to evade the decision of this court in the Lenzen Case; and the averments of the petition, together with the terms of the contract as set out in Exhibit A, impress us with the belief that such was, in part, the purpose of the council of the city in passing the ordinances, and requiring consumers to enter into contracts of the character set out in the exhibit.

A city has the power to require consumers to enter into contracts obligating them to comply with the reasonable rules and regulations which may be imposed for the operation and protection of the water system and for the use of water; but, as a prerequisite to furnishing a consumer a supply of water, the city has no power to require him to enter into an agreement absolving the city from the duties imposed upon it by law and release it from liability for its own negligence. The contract in question, which the plaintiff was required to sign, releases the city from liability for any scarcity or failure of supply of water, or for the quality thereof, or for any failure to supply water in the event of a fire of other casualty or happening, and it expressly exempts it from liability for failure or scarcity of water for fire or domestic purposes. It is averred in the petition that the sources from which the city obtained its water will furnish an unlimited supply of a wholesome quality, if the city should conduct its works with due care with reference to its obligation to the consumers. This contract, in terms, releases the city from its obligation to furnish water of good quality and sufficient quantity, and for a failure to supply water in the event of a fire on the premises or other casualty or happening. In other words, the purpose of these stipulations in this contract seems to be that, for any failure or refusal to furnish water to a consumer, either with reference to its quality or quantity, the city should be released from liability. We are clearly of the opinion, in view of the duty that the city owes to its consumers of water, that the imposition of a contract of this nature would be un-

Water Supply—Refusal to Sign Agreement Releasing City from Liability.

reasonable, and therefore void. It is probably true, if a consumer had entered into a contract of this nature and the city had undertaken under it to supply him with water, but had violated its duty and obligations resting upon it to furnish him an adequate and wholesome supply of water when it had it in its power to do so, that the consumer could have, nevertheless, held it liable for the damages he had sustained; for, although the consumer may have agreed to release the city, still, in urging his rights in an action against it, a court would not have enforced those provisions of the contract which were unreasonable, in that they released the city from its own negligence. While it is true that no obligation would have been created against a consumer by reason of such unreasonable terms in a contract of this nature, still the city has no right to require him to sign and execute a contract of this character as a prerequisite to his right to the use and consumption of water, and, upon failure to comply with this unreasonable request, to cut off the supply which he was entitled to by reason of his previous contract.

Same—Same.

It is next contended that as the ordinance upon which this contract is based, together with a contract of this nature, are void as being unreasonable, the city could not require him, as a condition for the use of water, to enter into a contract of a nature called for by section 27 of the ordinances. We clearly think the plaintiff is also correct in this contention. It is averred in the petition that the other inhabitants of the city are enjoying the privilege of the use of water under a similar rate as that given to the plaintiff in the contract of 1895, and that the situation and condition of these people is similar to that of the plaintiff. Upon the refusal of the plaintiff to sign the contract, as stated in Exhibit A, the city had no authority, under the averments of the petition, to require him to enter into a contract such as is required in section 27 of the ordinances; for a contract as required by that ordinance would place a greater burden upon the plaintiff, in requiring him to pay a greater price for the consumption of water for the same purpose than

that for which it was furnished the other inhabitants of the city. A city has the power and right to prescribe reasonable charges for the use of water it furnishes to consumers, but it has no power to discriminate between the inhabitants of the city in its charges for the use of water, when they occupy a similar situation.

The appellee contends that plaintiff should not resort to a court of equity for relief in a case of this nature, as he has an adequate remedy at law for damages. The law does not afford an adequate remedy in cases of this character. The plaintiff's wants in the use of water are immediate and pressing, and, if he is deprived of it, it would be difficult to determine and accurately measure the damages that he has sustained. The use of water is a necessity, and its want may be immediate and pressing, and it is difficult to see how a judgment for damages would be compensation for being deprived of the use of water, which is absolutely necessary, not only to make life enjoyable, but to sustain it. For the reasons stated, the judgment is reversed and the cause remanded. Reversed and remanded.

Refusal to Furnish Water—Remedies.

NOTE.

Municipalities—Refusal to Supply Water—Injunction.—The continuance of an illegal refusal on the part of a city to supply water to a consumer may be enjoined. Young *v.* Boston, 104 Mass. 95 Dayton *v.* Quigley, 29 N. J. Eq. 77.

ELECTRIC POWER CO.

v.

MAYOR, ETC., OF CITY OF NEW YORK *et al.*

(*Supreme Court of New York, Appellate Division, Jan. 17, 1899.*)

Removal of Wires—Conversion—Liability of City.—Where illegally erected electric wires are removed by direction of the city from

Electric Power Co. *v.* Mayor, etc., of New York

housetops, where they were erected with the consent of the owners of the houses, without offering the electric company a reasonable opportunity for collecting together and reclaiming the wires, the city is liable for the value of the wires so converted.

APPEAL by plaintiff from special term. *Reversed.*

Argued before GOODRICH, P. J., and CULLEN, BARTLETT, HATCH, and WOODWARD, JJ.

Roger Foster, for appellant.

Theodore Connoly (*Terence Farley*, on the brief), for respondents.

GOODRICH, P. J. The action on the amended pleadings is brought, among other things, to recover the value of certain fixtures and wires belonging to the plaintiff, which were alleged to have been converted by the defendants. The court at special term dismissed the complaint, and from the judgment entered thereon the plaintiff appeals. In the view which we take of this case no extended statement of the facts is necessary, and we refer only to those facts upon which our opinion is to be predicated. The plaintiff was organized as a corporation prior to 1888. In that year the board of electrical control of the city of New York passed a resolution by which the company was "authorized and empowered to lay, erect, and construct suitable wires or other conductors, with the necessary poles, pipes, or other fixtures, in, on, over, and under, streets, avenues, and public parks and places of the city of New York, for conducting and distributing electricity, * * * subject to all existing rules applicable thereto, and to all regulations of the privilege hereby conferred which this board may hereafter impose by resolution or otherwise; provided, always, and this consent is given upon this express condition, and not otherwise, that until the further order or resolution of this board the electrical conductors of the said company shall be laid, erected, or constructed, and the privileges above granted shall be exercised, only in and through subways constructed by the Consolidated Telegraph

and Electrical Subway Company, under and in pursuance of the provisions of the act chapter 716 of the Laws of 1887, under and in pursuance of the supervision of this board, to be leased to said company by the Consolidated Telegraph and Electrical Subway Company." Under this authority the plaintiff erected wires in different parts of the city, some on housetops, and across city streets, from house to house, and others on poles in the streets. It appeared that the wires on the housetops were erected with the consent of the owners thereof. In November, 1891, the defendant Gilroy, commissioner of public works, at the direction of the other defendants, cut down more than 20,000 feet of the wire belonging to the plaintiff from the housetops and removed it to the corporation yard. There was evidence tending to show that the value of the wire was about 21 cents per foot. In Electric Power Co. *v.* Metropolitan Telephone & Telegraph Co., 75 Hun, 68, 27 N. Y. Supp. 93, affirmed 148 N. Y. 746, 43 N. E. 986, it was held that, even if the plaintiff had illegally erected its wires on the street poles of the defendant, and the defendant had the right to remove such wires, yet by thereafter carrying away the wires it made itself liable for conversion; and that where it was shown that by direction of the defendant the wires had been cut from fixtures on housetops and removed by the agents of the defendant, without notice to the owner thereof, and without offering the plaintiff a reasonable opportunity for collecting together and reclaiming such property, the defendant was liable for the value of such wires. In the case at bar the learned trial justice decided that the commissioner of public works, according to law, cut down and removed to the public pound, for sale, such wires as were erected on the housetops, that it was impossible with any degree of accuracy to determine from the evidence the value of the wire taken from the streets, and "that any damage sustained by the plaintiff by reason of the wire being removed from the streets is not actionable." Under the authority cited, we think this was reversible error. We have intentionally refrained from expressing any opinion upon the

other points involved, preferring to leave those questions to be decided by the appellate division of the First department, from which the appeal was transferred to this department. For the reason stated, the judgment must be reversed and a new trial granted, with costs to abide the final award of costs. All concur.

HOGGARD *et ux.*

v.

MAYOR, ETC., OF MONROE.

(*Supreme Court of Louisiana, Feb. 6, 1899.*)

Torts of Common Council—Ultra Vires—Liability of Municipality.*—Municipal corporations are not liable in damages for acts of their common councils in respect to matters entirely outside of the powers of the corporation.

Ferries—Municipal Powers—Negligence—Pleading.—The authority of towns situated on navigable streams to establish and operate public ferries rests entirely, in Louisiana, upon special grants to that effect; and the fact of the existence of such a special grant must be averred in a petition seeking to hold a municipal corporation liable for damages claimed to have occurred in the maintenance of a public ferry.

(Syllabus by the Court.)

APPEAL by plaintiff, from parish of Ouachita judicial district court. *Affirmed.*

This case is before us through an appeal by plaintiffs from a judgment of the district court sustaining defendant's exception of no cause of action. Plaintiffs, in their petition, asked judgment in the sum of $15,000 as damages for the death of their minor son, who, it was alleged, was drowned from a ferryboat through the negligence and misconduct of defendant's servants and employees in charge of the boat. The allegations of the petition

Case Stated.

*See notes at end of case.

bearing upon the issue before us were: "That on the 18th of August, 1898, the defendant corporation was engaged in the maintenance and conduct of a public ferry across the Ouachita river, a navigable stream, within the corporate limits of the city of Monroe. That on said day Charles Hoggard, the minor son of petitioners, was engaged in hauling wood to the city of Monroe, and in so doing was compelled to cross the said Ouachita river at said ferry, and, at the invitation of defendant's servant and employee, entered the flatboat belonging to, and operated by, said corporation. Driving his team on said ferryboat, there being no barriers at the rear end of said boat, he stopped the same on or near the center of the boat, when he was required by the keeper of said ferry (the employee of said corporation) to drive to the rear of the flat or ferryboat, to make room for other wagons and teams thereon. That, in his effort to obey these instructions, his team became unmanageable, and walked off from the rear of said boat into the river, carrying and precipitating the wagon and petitioner's son with them into the stream, where, after a great and desperate effort and struggle to save himself, he was drowned. That, notwithstanding ample time elapsed from the precipitation of plaintiffs' son into the water until he lost his life, there was no effort whatever made by the said corporation, its employees and servants, to render him any assistance, or attempt to save his life. That the death of their son was the result of gross, wanton, and extreme negligence, and criminal carelessness, on the part of said corporation, and its employees and servants, in the fitting out and operating of said ferry, and not from any fault or carelessness of petitioners' son. That said negligence on the part of the corporation, its servants and employees, consisted, among other things, especially in its failure to provide its boats with suitable chains, poles, or other barriers to prevent teams, vehicles, and passengers from being precipitated, as was their son, into the river, which chains, poles, or barriers it was incumbent on the defendant corporation, under the law, as a keeper of a public ferry, to provide its

boats with, as well as other necessary appliances for the safety of persons trusting their lives and property into its temporary care and keeping. That said negligence of the defendant corporation, its servants and employees, especially consisted, further, in the command of the keeper of said ferry (he being the servant and employee of defendant) to plaintiffs' son to drive his team to the rear of said boat and make room for other teams, notwithstanding the absence of a barrier or other character of appliances to check the same, and prevent its precipitation into the water, and further in the absolute failure on the part of the corporation, its employees and servants, to make any effort whatever to assist plaintiffs' son in his struggles to save his life, notwithstanding there was ample time in which such effort could have been successfully made, if the said defendant had provided its ferry with properly constructed life-saving appliances, as it should have done, and which failure was negligence."

Hudson, Potts & Bernstein and *Charles J. Boatner*, for appellants.

Stubbs & Russell, for appellee.

NICHOLLS, C. J. (after stating the facts). Plaintiffs allege that the city of Monroe was engaged in the maintenance and conduct of a public ferry across the Ouachita river, a navigable stream, within the corporate limits of that city; but they nowhere allege that this was done under the authority of general law, of statutes conferring powers to that effect upon municipal corporations generally, of a special provision in its charter. The circumstance that municipal corporations may be situated on the banks of navigable streams does not carry with it an inherent or impliedly granted power to operate a ferry across the stream. Millsaps *v.* Mayor, etc., 37 La. Ann. 641. If it did, it would be proper for us to take judicial notice of the fact. We know of no statute conferring generally a power of that kind upon towns so situated. On the contrary, section 1501 of the Revised Statutes confers upon police ju-

Ferries—Municipal Powers—Negligence—Pleading.

ries, throughout the state, the exclusive privilege of establishing ferries within their respective limits, and of generally regulating the police of the same, except those within the control of municipal corporations. The ferries referred to as being "under the control of municipal corporations" are those under the control of municipal authority, by direct, general, or special statute grant. There being no general, inherent, or implied authority, or general statute vesting authority, in municipal corporations, to establish and operate public ferries, the right to do so must rest in particular cases upon special authority, and the existence of that authority should be specially pleaded. Plaintiffs herein make before us the broad contentions that the city of Monroe is bound to them independently of any authority in it, either general or special, to operate ferries. That liability flows from the fact itself that the city did carry on a ferry, and that, as resulting from that fact, injury was done to plaintiffs' son. They urge that it is monstrous to say that the city of Monroe should operate a ferry, freed from all responsibility for the manner in which it was conducted; but this argument involves an assumption of fact, that the "city" did operate such a ferry. It may be true that one was conducted under authority of the common council in the name of the city; but, unless the corporation itself was authorized to establish the ferry, it cannot be said that the act of the council was the act of the city. The council represents the city only in respect to matters which fall within the corporate powers of the corporation. Beyond this, its acts are *ultra vires*. We think that it is universally recognized as law that acts of the directing body of municipal corporations, covering matters entirely beyond the powers of the corporation, do not bind the latter, though it has been held, if the acts be within the powers, but directed to be done at some particular time, or in some particular manner, departure from such provisions of law would not necessarily make the acts absolutely void.

Torts of Common Council—Ultra Vires—Liability of Municipality.

Defendant refers the court, on this subject, to 2 Dill. Mun. Corp. §§ 968–971, and § 973a, note; 2 Thomp. Neg. p. 737; 15 Am. & Eng. Enc. Law, p. 1165; Elliott, Roads & S. pp. 355, 356; Shear. & R. Neg. § 299; Brice, *Ultra Vires* (Green's Ed.) p. 246; Becker *v.* City of La Crosse (Wis.) 75 N. W. 84; Royce *v.* Salt Lake City, 15 Utah, 401, 49 Pac. 290; Mayor, etc., *v.* Cunliff, 2 N. Y. 165; Smith *v.* City of Rochester, 76 N. Y. 506; Stoddard *v.* Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030.

Plaintiffs advance in support of their position a decision of the supreme court of the United States in Salt Lake City *v.* Hollister, 118 U. S. 256, 6 Sup. Ct. 1055; but we think the court in that case did not intend to go, nor did it in fact go, to the extent which plaintiffs assert. That case was presented and passed upon under an exceptional state of facts. The city of Salt Lake was not brought into court upon a claim made against it, based on either contract or tort, but was in court as a plaintiff seeking to recover money which it alleged it had been improperly and illegally made to pay, but under protest. The city, in bringing its suit, fell under the operation of the rule that the right to resist payment of a claim, when advanced, is much broader than is the right when money has been paid under it to recover it back. Independently of this, the supreme court held that the law made the imposition of a tax in favor of the government follow as the immediate and direct result of the fact itself of the carrying on of a particular business, without reference to who carried it on, or under what circumstances it was done. The city of Salt Lake had, without authority, carried on a distillery. Called on to pay a tax, it made the payment, but, under protest, and sought afterwards to have the sum so paid reimbursed to it. The court held that the claim so presented was not well founded, and, in the course of its opinion, declared and showed that the acceptance of the doctrine contended for was against public policy, in tax matters, as it would lead to the destruction of the tax system. There is no matter of public policy favoring the acceptance of the

doctrine advanced by plaintiffs in cases like the present. On the contrary, it would lead up necessarily to ruinous public results, and would do away with all the checks which experience has shown to be absolutely essential for the safety and well being of the different communities. We would not be justified in departing from established legal landmarks to meet the hardships and supposed equities of a particular case. For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

NOTES.

Ultra Vires—Torts—Liability of Municipalties.—A city is not responsible for damages resulting from work done negligently or otherwise, under the supposed authority of illegal and void votes of the city council. Cavanagh *v.* Boston, 139 Mass. 426. And see Wakefield *v.* Newport, 60 N. H. 374; Shelby Co. *v.* Deprez, 87 Ind. 509; Browning *v.* Owen Co., 44 Ind. 11; Leeds *v.* Richmond, 102 Ind. 72; Albany *v.* Cunliff, 2 N. Y. 165; Smith *v.* Rochester, 76 N. Y. 506; Denver *v.* Bayer, 7 Colo. 113; Denver *v.* Dean, 10 Colo. 375; Idaho Springs *v.* Woodward, 10 Colo. 104; Idaho Springs *v.* Filteau, 10 Colo. 105; Bennett *v.* New Orleans, 14 La. An. 120; Seele *v.* Deering, 79 Me. 343; Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 534; Lemon *v.* Newton, 134 Mass. 476; Anthony *v.* Adams, 1 Metc. (Mass.) 284; Cushing *v.* Bedford, 125 Mass. 526; Tindley *v.* Salem, 137 Mass. 171; Worley *v.* Columbia, 88 Mo. 106; Brown *v.* Cape Girardeau, 90 Mo. 377, 59 Am. Rep. 28; Mitchell *v.* Clinton, 99 Mo. 153, 52 Am. Dec. 608; Horn *v.* Baltimore, 30 Md. 218.

Liability of Municipalities for Ultra Vires Contracts and Acts.—See generally Holder *v.* City of Yonkers (N. J.), *ante* 164, and extensive *note*, 167 *et seq.*

BLACK *et al.*

v.

COMMON COUNCIL OF CITY OF DETROIT *et al.*

(*Supreme Court of Michigan, March 23, 1899.*)

Entertainment Fund—Resolution of City Council—Taxpayers—Notice—Laches.—Although the resolution of the city common council, ordering the transfer of a certain sum to the entertainment

Black *v.* Common Council of City of Detroit

fund, was regularly published, complainants (citizens and taxpayers of the municipality) could not be chargeable with laches in complaining thereof until after they had received actual notice of its passage.

Same—Municipal Powers.*—In the absence of express authority, municipal corporations cannot legally expend money for entertainments; and a discretionary power to credit moneys not received for the purpose of any particular fund to such fund as the common council may direct is not such express authority.

Ultra Vires Contracts.*—Where a contract entered into in behalf of a city by its officers is beyond the scope of its powers, there can be no recovery against the city in any form,—neither under the contract nor *quantum meruit*, even though the city has had the benefit of the performance of the contract.

Municipal Powers—Notice.*—All who deal with a municipal corporation are chargeable with notice whether or not the contract upon which they rely is within its powers.

APPEAL by defendants from Wayne county circuit court in chancery. *Affirmed.*

Charles Flowers (*John J. Speed*, of counsel), for appellants.

Warner, Codd & Warner and *Walker & Spalding* (*C. A. Kent*, of counsel), for appellees.

LONG, J. This bill was filed by Clarence A. Black and 12 other citizens and taxpayers of the city of Detroit against the common council, the controller, and the treasurer of the city, to restrain them from using or expending the sum of $5,000, which the common council of the city, by resolution, directed to be paid into the entertainment fund, from and out of the general fund. The charter of the city of 1893, by section 222, provides that the common council shall have power to annually levy, assess, and collect, on the assessed value of all real and personal property of the city made taxable by the laws of this state, a sum not exceeding $2,000, for the purpose of defraying the expenses of receptions, entertainments, and celebrations, to be expended from time to time therefor in such manner as the common council shall by resolution direct. On April 19, 1898, by resolution of the council, the gross sum of

Case Stated.

*See notes at end of case.

$3,304,247.31 was adopted as the estimate for the year 1898, to be assessed and collected to defray the expenditures of the several funds for the year ending June 30, 1899. This gross fund embraced the sum of $2,000 for the fund known as the "Public Entertainment Fund," and this sum is the only amount allowed by the estimates of the city and the common council for public entertainments for such fiscal year. The city moneys are, under the charter, divided into specific funds, each of which is to be applied to specific purposes, and no other. The transfer of money from one fund to another is prohibited. It appears, however, that before these moneys were transferred to the entertainment fund the city had paid from its general fund, for gas used by the county of Wayne in the county offices, about $40,000, for which it made claim against the county, and which claim was finally adjusted at $20,000. On July 12, 1898, there remained an unpaid balance of $5,000 on this claim; and on that day the common council, by resolution, directed the controller, upon collecting that sum, to credit it to the public entertainment fund, for use in entertaining the League of American Municipalities in August following. This sum was paid to the controller, and transferred by him to that fund, and it is admitted that it was the intention of the city and the other defendants to use this money for the purposes directed by the resolution of the council. The convention of this league was to commence on August 2d, and upon August 1st this bill was filed, and a temporary injunction issued, restraining the use of this $5,000 for that purpose. One Thomas J. Smith, who had supplied $1,000 worth of fireworks to entertain the league, was permitted to intervene as a defendant. His testimony shows that he had this material in Detroit on July 28th, and that it was used on August 2d, the day after the injunction was granted. He further testified that when he made his contract and when he furnished the material he knew nothing about the condition of the entertainment fund of the city, or about its other funds, and that he knew nothing about any other contracts

made by the city for such entertainment. On the hearing below, the injunction was made permanent. Defendants appeal.

The answer of the city alleges that, before the filing of the bill, contracts had been entered into with various parties, amounting to $7,000, which were based upon the supposed fact that there was $7,000 lawfully in the entertainment fund, and that said contracts had, for the greater part, been executed. The answer also alleges that long before the filing of the bill the complainants knew that said contracts were being made and executed, and said expenditures made, and that they willfully permitted them to go on until nearly the full amount of $7,000 had been used or appropriated, before filing their bill of complaint. The facts are not in dispute.

1. Counsel for defendants contend that the complainants were guilty of laches in not filing their bill sooner, as it appears that the common council as early as July 12th adopted a resolution ordering the controller to transfer this $5,000 to the entertainment fund, and that 15 days elapsed from that time before defendant Smith had his material on the ground, and 19 days before the bill was filed. It is not claimed that complainants had actual notice of these matters, but counsel contend that, the council proceedings being regularly published, this was sufficient notice. We think, however, that actual notice or knowledge of a proceeding complained of is necessary, to take away the right to object thereto, on the score of laches. Here the complainants moved within 4 days after they had knowledge of the proceedings to expend this fund.

Entertainment Fund—Resolution of City Council—Taxpayers—Notice—Laches.

2. Counsel for the city contends that, while there is a limitation upon the amount to be raised, yet the same section gives power to expend moneys for entertainments, and that authority is found in other sections of the charter to place other moneys to the credit of the entertainment fund. Attention is called to the limitation placed upon the power to raise by tax the

Same—Municipal Powers.

principal funds of the city, such as the general fund, poor fund, general road fund, and fire commissioner fund; but counsel says that this limitation is not directed, in terms, to the amount of each fund, but is fixed at 1 per cent. of the taxable property for all the funds named. The contention is, therefore, that this limitation does not limit the amount of the expenditures from these funds, if the moneys therefor may be raised by other sources than taxation. Attention is also called to section 207 of the charter, which provides that all moneys not raised or received for the purpose of any particular fund shall be credited to the general fund, or such other fund as the common council shall direct. Therefore it is argued that this $5,000 coming from the county might, under this provision of the charter, be placed in the entertainment fund, and, not being raised by taxation, the council could expend it for such entertainments. There might be some force in these contentions, if expenditures for entertainments were within the scope of general municipal powers; but, unless expressly conferred, there is no such power. Dill. Mun. Corp. (3d Ed.) § 149; Gregory *v.* City of Bridgeport, 41 Conn. 76. Section 222 of the charter, in effect, empowers the expenditure for entertainments of a sum not exceeding $2,000, which is to be raised by taxation. There is no other grant of power to expend anything for this purpose. For this reason, the discretionary power given by section 207 to credit moneys not received for the purpose of any particular fund to such fund as the common council may direct does not apply. There being no power to expend more than $2,000 in any one year for such purpose, there is no power to credit moneys in excess of $2,000 to that fund. While there is a limitation, by the provisions of section 184, on the power to raise money by taxation for the purposes of certain funds, there is no limitation in the charter on the power to expend moneys for the purposes for which those funds are raised; but the power to provide for those purposes is given in general terms by the provisions of chapter 7 of

the charter. The common council therefore exceeded its power in placing this $5,000 in the entertainment fund.

3. Counsel for defendants further contend that, although the common council had no power to place this $5,000 in the entertainment fund, yet defendant Smith having in good faith entered into a contract with the city, and having given his money and property, and the city having had the benefit of the performance of the contract, it is bound to make compensation. Counsel cite sections 935 and 936 of the fourth edition of Dillon on Municipal Corporations to sustain this contention. The proposition is there laid down that: "As regards a *bona fide* contractor with the city, who has expended his money for its benefit in respect of a matter within the scope of its general powers, the contract would not be *ultra vires*, in the true sense of the term; and the city would be estopped to set up as a defense its own irregularities in the exercise of a power clearly granted to it." Counsel cite several cases sustaining this proposition, which is undoubtedly well settled. But the expenditure of moneys for such purposes is not within the scope of the general powers of municipalities. Dillon lays down the rule that: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the court against the corporation, and the power is denied. Of every municipal corporation, the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability not authorized thereby. All acts beyond the scope of the powers granted are void." Dill. Mun. Corp. (4th Ed.) § 89. The common council of the city of Detroit had no general

Ultra Vires Contracts.

power to raise money for the purpose of entertainments. Its power was limited by section 222 to raise by taxation $2,000 in each year for that purpose. Not having the power to raise any greater amount, it had no power to enter into contracts to expend any greater amount. It is said, however, that the city is liable because it has had the use of the supplies which defendant Smith furnished. But, as said in Spitzer *v.* Village of Blanchard, 82 Mich. 234, 46 N. W. 400, "the limitation of power upon the common council appears in the public statute, and is presumed to be known by all dealing with corporate authorities." Those who deal with the agents of municipal corporations must take notice of the restrictions in their charters in respect to the powers of the corporation and its agents, and the mode in which such powers may be exercised, and must see to it that the contracts on which they rely are authorized by the charter. Commercial Bank of Rochester *v.* City of Rochester, 42 Barb. 488; McDonald *v.* Mayor, etc., 68 N. Y. 23. In Hodges *v.* City of Buffalo, 2 Denio, 110, the plaintiff insisted that, though the city had no express authority to make the expenditure, yet the claim could be satisfied on the ground that, the plaintiff having furnished the entertainment, the corporation had received the consideration, and was bound to pay, although the engagement was made without legal authority. The court said in that case: "It is said to be analogous to a subsequent ratification by a corporation of the unauthorized act of its agent. I cannot concur in this view of the case. The doctrine referred to assumes that the principal had power to confer the requisite authority in the first instance. It cannot be maintained that a corporation can by a subsequent ratification make good an act of its agent which it could not have directly empowered him to do. Where the contract is void, a contractor cannot recover of the corporation in any form,—neither under the contract nor *quantum meruit*. All who deal with a municipal corporation must see that the contract upon which they rely

Municipal Powers—Notice.

is within its powers,"—citing Halstead *v.* Mayor, etc., 3 N. Y. 430; Brady *v.* Same, 20 N. Y. 319; Cowen *v.* Village of West Troy, 43 Barb. 48.

The court below was not in error in directing the decree in favor of complainants, and making the injunction permanent. The decree must be affirmed, with costs.

MONTGOMERY, J., did not sit. The other justices concurred.

NOTES.

Entertainments—Municipal Powers.—In the absence of express statutory authority municipal corporations cannot furnish entertainments for their citizens and guests at the public expense. Hale *v.* People, 87 Ill. 72; Jerry *v.* Stoneham, 1 Allen (Mass.) 319; Hodges *v.* Buffalo, 2 Denio (N. Y.) 110.

Under a clause in a charter providing that "nothing in this charter shall be construed . . . as giving the power to vote money for any ordinary object except for the regular, ordinary and usual expenses of the city," the city council of Newport gave a ball and banquet. Certain tax-payers obtained a temporary injunction restraining the treasurer from paying the bills, which, upon final hearing, was sustained and made perpetual. Austin *v.* Coggeshall, 12 R. I. 329, 34 Am. Rep. 648.

But in *Pennsylvania* it has been held that the city of Philadelphia, under its charter and the supplements thereto, has the power of providing for the entertainment of distinguished visitors, and an ordinance thereunder providing for official contingent expenses is legal, but not one providing for expenses foreseen, which might have been specifically named, but which were not. Tatham *v.* Philadelphia, 11 Phila. (Pa.) 276. See also extensive *note*, 1 Mun. Corp. Cas. *ante* 142 *et seq.*

Municipal Corporations—Ultra Vires Contracts.—See Holder *v.* City of Yonkers, (N. J.), *ante* 164, and extensive *note*, 167 *et seq.*

TOWN OF SOUTH PORTLAND

v.

TOWN OF CAPE ELIZABETH.

(*Supreme Judicial Court of Maine, Dec. 28, 1898.*)

Severance of Territory—Liability for Debts.*—When part of a town is set off and incorporated as a new town, the old town, though shorn of part of its territory, still retains all the property, powers, and rights, and remains subject to all the obligations, of the original town, unless otherwise provided in the act.

Same—Apportionment of Indebtedness—Obligation to Refund.—Chapter 194 of the Special Laws of 1895, which divided the town of Cape Elizabeth, treats South Portland, though under another name, as the old town from which the "new town" of Cape Elizabeth was set off. South Portland, being treated in the act as the original town, became primarily liable for all its debts, and is entitled to receive its assets. The act provided that "the town debt shall be borne by said towns in proportion to the valuation of taxable property and estate within their respective territories, as taken by the assessors in April, eighteen hundred and ninety-four." Prior to the annual meetings in March, 1897, in both towns, a committee from each had ascertained and reported to each town at that meeting that South Portland had paid of the debts of the old town, in excess of assets received, $25,150.09, and that Cape Elizabeth's proportion of that excess was $6,053.69. These reports were accepted by each town, and no question appears to have been raised as to the accuracy of their amounts.

Held, that under the provisions of section 3 of the act (Sp. Laws 1895, c. 194) it then became the duty of Cape Elizabeth to refund to South Portland this amount, and the law implies a promise on the part of Cape Elizabeth to pay it.

Same—Same—Construction of Statute.—The town property, consisting of school houses, ferry wharf, and other like property, was apportioned by section 4 of the act (Sp. Laws 1895, c. 194) by giving to each town what was situated within its territory. *Held*, that the language of the section is plain and imperative, and cannot be

*See notes at end of case.

Town of South Portland *v.* Town of Cape Elizabeth

modified by the court to meet any supposed equity. It was within the province of the legislature to make such division, and it is to be presumed that the legislature considered all the equities.

Right of Action. –*Held*, that South Portland is entitled to recover from Cape Elizabeth its proportion of debts paid by South Portland, immediately after the payment. It is not obliged to wait till all the debts are paid.

(Official.)

EXCEPTIONS by defendant from Cumberland county superior court. *Overruled.*

Argued before PETERS, C. J., and EMERY, WHITEHOUSE, STROUT, and SAVAGE, JJ.

Nathan & Henry B. Cleaves, *Stephen C. Perry*, and *Edward C. Reynolds*, for plaintiff.

J. W. Symonds, *D. W. Snow*, *C. S. Cook*, and *Elgin C. Verrill*, for defendant.

STROUT, J. This cause was submitted to the presiding justice with right of exception. To his ruling that plaintiff was entitled to recover, exception was taken.

Case Stated.

The legislature, in 1895 (chapter 194, Sp. Laws), set off and incorporated a portion of the old town of Cape Elizabeth into a new town by the name of Cape Elizabeth, and the remaining portion of the old town was given the name of South Portland.

The act provided (section 3) that : "The existing liabilities of the present town of Cape Elizabeth shall be divided as follows : The town debt shall be borne by said towns in proportion to the valuation of taxable property and estate within their respective territories, as taken by the assessors in April, eighteen hundred and ninety-four; and shall continue to pay the same proportion of the state and county taxes assessed upon the present town of Cape Elizabeth, until a separate valuation shall be made by the state assessors. All paupers now supported or aided by the present town of Cape Elizabeth, or that may hereafter become chargeable as paupers, shall, after division, be chargeable to and main-

tained and supported by the new town of Cape Elizabeth, or the town of South Portland, according as their last settlement may fall within the respective territories of said towns."

Section 4 provided that "all town property, real and personal, now situated within the limits of said new town of Cape Elizabeth, shall become the property of said new town and all town property, real and personal, now situated within the limits of said town of South Portland, shall become the property of said town of South Portland."

It will be observed that these two sections treat South Portland, though under another name, as the old town from which the new town is set off, and the Cape Elizabeth created by the act as a "new town." This distinction is important, as it shows the primal relation which South Portland bears to the debts and duties of the old town of Cape Elizabeth. Where part of a town is set off and incorporated as a new town, the old town, though shorn of part of its territory, still retains all the property, powers, and rights, and remains subject to all the obligations, of the original town, unless otherwise provided in the act. Frankfort *v.* Winterport, 54 Me. 250; North Yarmouth *v.* Skillings, 45 Me. 133; Poland *v.* Strout, 19 Me. 121; Inhabitants of Windham *v.* Inhabitants of Portland, 4 Mass. 384.

Severance of Territory—Liability for Debts.

As the act treated South Portland as the old town from which the "new town of Cape Elizabeth" was set off, it became the duty of South Portland primarily to liquidate the liabilities of the original town; the new town of Cape Elizabeth, by the act, being responsible to refund its proportion of such liabilities to South Portland. Creditors of the old town could require payment from South Portland; they could not from the new town.

Same—Apportionment of Indebtedness—Obligation to Refund.

Both towns have acted in accordance with this view. Taxes assessed before division upon inhabitants of the new town were collected and paid into the treasury of South Portland. All other available assets, except some tax deeds

and sewer assessments, which were divided by agreement, have been turned in to that town, and that town has paid all the debts of the original town which have been paid.

Shortly after the division each town appointed a committee to confer with each other to adjust the financial affairs between the two towns. These committees met and acted as a joint committee, and appointed a subcommittee from its members to examine and report to the joint committee the assets and liabilities of the old town. The subcommittee made its report to the joint committee, which was adopted by the latter unanimously, and each town committee reported the result to the annual meeting of each town in March, 1896. These reports gave the amount of liabilities and assets, both agreeing, and each town at that March meeting accepted the report, and continued its committee to make further progress by way of final settlement. The vote of defendant town was to "adopt" the report of the committee.

At the March meeting in 1897 each committee again reported to its town, both agreeing upon the amount of liabilities paid by South Portland, and amount of assets received by it, and the share of the excess of payment which devolved upon the defendant town, which is the amount sued for in this action. Defendant town at that meeting accepted the report of its committee, but the committee of defendant town claimed that public property, such as school houses, ferry wharf, gravel banks, and like property, should be treated as assets for the payment of debts. They had not been so treated by the joint committee.

The committee of defendant town claimed that, to ascertain its liability under section 3 of the act, all this class of property should be valued and treated as an asset, and, together with available assets, which the joint committee had ascertained, should be deducted from the gross liability, and that the result thus obtained would constitute the net debt, to be apportioned according to the valuation of 1894; while South Portland claimed that this class of property was di-

vided by section 4 of the act, and should not enter into the calculation.

We do not understand that the parties disagree as to these amounts, nor is it denied that the payments were made upon legal claims against the original town. But defendant insists that no promise on the part of the new town of Cape Elizabeth can be implied in favor of South Portland, because it was not consulted about the payments, and because they were not made at its request.

And counsel say that the writ declares upon an accounting by the committees of the two towns, and adoption by them of the result, and a promise to abide and pay, and that the evidence fails to show such adoption or promise. However this may be, the writ contains a money count under which sums equitably due may be recovered. South Portland was bound to pay these debts in the first instance. Then the liability of the new Cape Elizabeth attached. In such case, payment by South Portland was not a voluntary payment of another party's debt, without his request or consent, but it was a payment of its own debt, to which defendant was bound by law to contribute its proportion. Defendant's liability does not depend upon express agreement, or previous request of payment. The duty of payment was upon South Portland; and when it had paid, and as fast as it paid, the duty to reimburse its proportion was imposed upon the new Cape Elizabeth. Where the law imposes the duty of payment, it implies a promise to pay. Farwell *v.* Rockland, 62 Me. 301; Mt. Desert *v.* Tremont, 72 Me. 348; Inhabitants of Brewster *v.* Inhabitants of Harwich, 4 Mass. 278.

But there is another ground more strongly relied on in defense. It was claimed, and offered to be proved, by the defendant, that at the time of the division of the towns there was property of the old town of the value of nearly $88,000, a schedule of which appears on page 35 of the case, consisting of school houses and school property, gravel banks, ferry wharf and landing, and like property, all of which was subject to the provisions of section 4 of the act of division; that

of this property nearly $75,000 in value was in South Portland, and nearly $13,000 in the new town of Cape Elizabeth; that if South Portland received of this property all that was within its territorial limits, as provided by section 4 of the act, that town would receive about $10,000 more than its proportional share; and that this excess should either be set off against plaintiff's claim, or that it should be adjusted in equity, as prayed for in the brief statement, and allowed to defendant to make the division of the property equal, under the proportion established by section 3 of the act of division. This evidence was excluded, and exception taken.

It may be said, in passing, that if the claim of the committee of defendant town that the debt to be apportioned under section 3 was the net debt, after deducting all town assets, and that the property mentioned in this schedule should be treated as an asset, this inequitable result would follow. The committees of both towns found the gross liabilities of the old town to be $78,690.38. The assets they found to be $37,894.42. If to these assets is added the school and other property in the schedule, valued at $87,746.70, there would be a total of assets of $125,641.12, an excess of $46,950.74 over the gross liabilities. South Portland would thus be required to pay the entire indebtedness without contribution from defendant town, and the property mentioned in the schedules would go to each town according to its location in each, under the provisions in section 4. The statement proves the fallacy of the claim.

Counsel for defendant do not press this bald proposition in terms, but they do say that "the town property is a fund which must justly be considered as offsetting or reducing gross liabilities, and it is a fund in which each part of the town, upon division, should share proportionately." If limited to property available for payment of debts, the proposition is true.

School houses and other like property, built, maintained, and used for public purposes, and necessary thereto, are not to be converted into cash for payment of debts. If it was done,

the town would be obliged at once to replace them, and nothing would be gained. Such property, therefore, cannot be treated as an asset when debts and resources for their payment are considered.

But it is strenuously urged that, notwithstanding the provisions of section 4, by which this property is specifically divided, and the impracticability of treating it as an asset, the court should go into an equitable accounting in regard to it, and adjust for itself its fair and equitable division; and that, when this is done, it is claimed that the payments therefor made by South Portland are not in excess of its proportion, and therefore it cannot recover; that the division of this property made by section 4 leaves to South Portland about $10,000 in value in excess of its proportion under the ratio established by section 3, and that, to equalize this, South Portland should pay upon the debts of the old town that amount in excess of its proportion fixed by the statute.

Same—Same—Construction of Statute.

Upon the division of a town the legislature is presumed to take into consideration all the equities when it divides this class of property. Questions of public policy and expediency enter in, and of these the legislature is the exclusive judge.

Towns derive existence only from the will of the legislature and by it may be divided or destroyed, as it shall deem for the interest or the state or the inhabitants of the town. The court cannot stay its hand, or control or modify its exercise.

In this case the legislature has said that all of this class of property within the territorial limits of each town shall belong to such town. It was competent for the legislature to so determine. We have no power to revise that decision. North Yarmouth *v.* Skillings, 45 Me. 141; Frankfort *v.* Winterport, 54 Me. 250; Agawam *v.* Hampden, 130 Mass. 530; Kingman, Petioner, 153 Mass. 573, 27 N. E. 778; Whitney *v.* Stow, 111 Mass. 372; Rawson *v.* Spencer, 113 Mass. 45.

The language of section 4 is plain and explicit. No apparent equity can be imported into it to modify its express

declarations. It gave to each town absolutely the property situated in each. Section 3 apportions "the town debt"; section 4 divides "town property." It is the plain duty of the court to give effect to these provisions according to their terms and the evident intention of the legislature. The evidence offered was rightfully excluded.

But, if the evidence is considered, it is not apparent that South Portland has received the large excess of property claimed by the defendant. In its schedule, defendant includes the ferry wharf and landing, which it values at $10,000, —about the excess claimed. But this wharf and landing is a highway. It was laid out as such by the old town, under authority of chapter 602 of the Special Laws of 1871, for the purpose of a ferry to the city of Portland, and has always been used as such, and is not likely ever to be used for other purposes. It is said that no income is derived from it; no evidence of any was offered. The burden of maintaining it falls upon South Portland, while its use, like other highways is for the public generally. It can, in no just sense, be treated as an asset.

It is also urged that plaintiff should be postponed until all available assets shall be realized, and all debts of the old town paid, and then the proportions of the two towns should be adjusted; that there are still outstanding debts and doubtful assets that may be realized, and that only when these are ascertained can the proportion be adjusted. It may be many years before the whole debt shall mature, and it is manifestly a hardship to require South Portland to await that event before being reimbursed for the outlay it was compelled to make, for which the defendant is by law responsible. Such a result is not required by law, nor is it necessary to protect the rights of defendant.

Right of Action.

The committees of both towns agreed upon the amount of available assets and the liabilities. Their report of that agreement was accepted by both towns. Those reports stated that South Portland had paid of the debts of the old town, in

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excess of all the available assets found by the committees, the sum of $25,150.09, and that the share of the new town of Cape Elizabeth of that excess was $6,053.69. No question of the correctness of these figures appears to have been made by the defendant town at the time of the committee's report, nor at any time since, nor that the payments were not properly made upon legal debts of the old town. If any further assets shall be realized by South Portland, they must be applied towards the extinguishment of the debts of the old town, or ratably divided, if the two towns so agree. Further payment of debts of the old town can easily be apportioned.

It is also objected that a lump sum is sued for, and the items not given. If defendant had desired a specification of items, the court would have ordered it. It is now too late to make the objection. But, if it were not, the action of defendant town upon the report of its committee and ever since may well be treated as an assent to the accuracy of the amount of payments for the old town. The justice who heard the cause decided that plaintiff was entitled to recover the amount which the committee had reported as the share belonging to defendant to pay. That ruling necessarily was based upon a finding of the fact that that sum was the defendant's share. Such finding of fact is conclusive.

The plaintiff is entitled to recover of defendant its share of plaintiff's payment in excess of plaintiff's proportional share as established by section 3 of the act of division.

The decision below was correct.

Exceptions overruled.

NOTES.

Division of Municipality—Property and Debts.—Where a portion of a municipality is severed and incorporated as a new municipality, the old corporation, in the absence of statutory provisions on the subject, retains all the corporate realty within her new limits, is entitled to all claims owing to it, and is liable for all corporate debts existing at the time of the severance; and the new corporation re-

Notes

tains all the corporate realty within her limits, free from any claim on the part of the old corporation. Mount Pleasant *v.* Beckwith, 100 U. S. 532; North Yarmouth *v.* Skillings, 45 Me. 141, 71 Am. Dec. 530; Greenville *v.* Mason, 53 N. H. 515; People *v.* Trustees of Schools, 86 Ill. 613; Richland Co. *v.* Lawrence, 12 Ill. 1; Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530; Town of La Pointe *v.* O'Malley, 47 Wis. 332; Town of De Pere *v.* Town of Bellevue, 31 Wis. 120, 11 Am. Rep. 602; Goodhue *v.* Beloit, 21 Wis. 636; Butternut *v.* O'Malley, 50 Wis. 333; Windham *v.* Portland, 4 Mass. 384; Cobb *v.* Kingman, 15 Mass. 197; Minot *v.* Curtis, 7 Mass. 441; Inhabitants of Hampshire *v.* Inhabitants of Franklin, 16 Mass. 86; Richards *v.* Daggett, 4 Mass. 539; Board of Education of Barker Dist. *v.* Board, etc., of Valley Dist., 30 W. Va. 424, 20 Am. & Eng. Corp. Cas. 11; Sill *v.* Corning, 15 N. Y. 297; Mayor, etc., of Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572; Borough of Dunmore's Appeal, 52 Pa. St. 374; North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109; Chickasaw Co. *v.* Sumner Co., 58 Miss. 619; West Carroll Parish *v.* Gaddis, 34 La. An. 928; Brewis *v.* Duluth, 3 McCrary (U. S.) 219; Pierson *v.* Reynolds, 49 Mich. 224; Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149; affirmed, 10 How. (U. S.) 511; Fender *v.* Neosho Falls, 22 Kan. 305; State *v.* Lake City, 25 Minn. 404.

Same—Ownership of Realty within Limits of New Municipality—Minnesota.—In *Minnesota* it was recently decided that if a part of the territory of a municipal corporation is separated from it by annexation to another, or by its erection into a new corporation unless some other provision is made in the act authorizing the separation, the old corporation (it not having been abolished) remains subject to all its liabilities, and retains all its property, *including that which happens to fall within the limits of the other corporation.* Winona *v.* School Dist. No. 82, 40 Minn. 13, 24 Am. & Eng. Corp. Cas. 121. And the following cases were cited as in line with the court's decision on this point: School Dist. *v.* Richardson, 23 Pick. (Mass.) 62; Union Baptist Society *v.* Town of Candia, 2 N. H. 20; Board of Health of Buena Vista *v.* East Saginaw, 45 Mich. 257; Town of Milwaukee *v.* Milwaukee, 12 Wis. 93; North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

LESLIE

v.

CITY OF GRAND RAPIDS.

(*Supreme Court of Michigan, April 18, 1899.*)

Defective Street—Injury to Bicycle Rider—Liability of City.—Under the statute of Michigan, a municipality, keeping its streets in a reasonably safe condition for ordinary vehicles, is not liable for personal injuries caused by the fact that one of its streets was, because of defects, not in a suitable condition for bicycles.

ERROR by plaintiff to superior court of Grand Rapids. *Affirmed.*

Taylor & Eddy, for appellant.
Henry J. Felker, for appellee.

LONG, J. This action was brought to recover damages for personal injuries sustained by plaintiff, who was thrown from her bicycle, on the evening of November 26, 1897, in consequence of the defective condition of the asphalt pavement on Canal street, in that city. That street was paved with asphalt covering, from 2 to 3 inches in thickness. The break in the pavement into which the plaintiff rode with her wheel was about 2½ feet by 2 feet in extent, and from 2 to 2½ inches deep. The asphalt had been worn away down to the concrete by the passage of teams over it. It is one of the most used streets in the city, hundreds of teams passing over it daily. The asphalt was worn in several other places, as well. These holes or broken places had existed for 60 days or more previous to the accident, so that the real controversy arises over the question whether the city was bound, under the statute, to keep its streets in a reasonably safe condition and fit for vehicles of that character to pass over it. It appears, without contradiction, that it was in reason-

ably safe and fit condition for ordinary vehicles, such as wagons and carriages. It has been held in this state, and in others, that a bicycle is a vehicle; but the question has never before been presented in this state whether, under this statute, the streets must be kept in a reasonably safe condition for this class of vehicles. When the amendment to the statute was passed in 1887, this class of vehicles was in use only to a limited extent, and we do not think the legislature had this class of vehicles in mind, or intended to place the burden upon townships and cities to keep their roads and streets in a safe condition for them. Reasonable care in the construction and maintenance of highways for ordinary vehicles, such as wagons and carriages, is the measure of duty resting upon municipalities. In Sutphen *v.* Town of North Hempstead, 80 Hun, 409, 30 N. Y. Supp. 128, the court said: "It is apparent that a bicycle rider upon an ordinary country road is exposed to greater dangers than a person riding in a wagon, and the great increase in the number of persons using these vehicles has created a demand for better and safer roads; but, under the present highway laws, a road in a condition which is reasonably safe for general and ordinary travel is all that the commissioners of highways are bound to maintain." Our statute makes no distinction between country roads and streets in cities and villages. If a highway in the country is not kept in a reasonably safe and fit condition for public travel, the liability for injuries attaches, and the same statute imposes upon cities and villages a like burden. The testimony in the present case is conclusive that, while hundreds of ordinary vehicles passed and repassed over this street daily, no accidents or injuries occurred. There is no question but that the street was reasonably safe and fit for that kind of travel; and that is all the statute requires. If the statute ought to be extended to cover vehicles of the bicycle class, that question must be addressed to the legislature, and not to the courts. The court below should have directed the verdict in

favor of the defendant; therefore it is unnecessary to discuss the various assignments of error set out by counsel for plaintiff. The jury found in favor of the defendant. That judgment must be affirmed.

HOOKER, J., did not sit. The other justices concurred.

CITY OF KANSAS CITY

v.

MCDONALD.

(*Supreme Court of Kansas, May 6, 1899.*)

Speed of Vehicles—Whether Ordinance Applies to Fire Department.*—An ordinance making it a misdemeanor for any person intentionally to ride or drive any horse, mule, or other beast faster than an ordinary traveling gait in any of the streets of the city is unreasonable, when sought to be applied to the fire department in driving to a fire, and for that reason will not be enforced.

Death of Fireman—Obstruction in Street—Action against City—Defenses.*—The fact that a city, having a paid fire department, procured an accident policy for one of its firemen, under the provisions of chapter 363, Laws 1895, and that the amount of the policy was paid to the widow of said fireman after his death, is no defense to an action brought by her, under section 422 of the Code (Gen. St. 1897, c. 95), against said city for its negligence in causing said death.

Evidence.—in an action against a city for negligently allowing an obstruction, such as a pile of rocks, to remain in a street unguarded and without lights or other warnings to travelers thereon, by reason of which an accident occurred, it is competent to show that other obstructions not alleged in the petition narrowed the roadway, and also the condition of the street, together with all the surroundings at the time and place of the accident.

Remarks of Counsel.—A mere exception to the language of counsel in argument to the jury, not preceded by any ruling of the court is insufficient to raise a question as to the propriety of the language used.

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*See note at end of case.

City of Kansas City *v.* McDonald

Rules of Fire Department—Evidence.—Rules of a fire department requiring its members to drive in the middle of a street when going to a fire are made for the safety of the men, teams, and vehicles; and a driver of a hook and ladder truck is charged with the use of no greater care and precaution for his safety by such rule than he would be if such rule did not exist.

Duty to Maintain Streets in Safe Condition—Degree of Care Due Firemen.†—Cities are required to keep and maintain their streets in reasonably safe condition for public travel, and are held to as great a degree of care towards a fireman driving over the same in discharge of his duties as they are to any other traveler.

Obstructing Street with Building Material—Duty of City.*—Persons constructing buildings abutting on a street have, in the absence of express permission from the city, the right to use temporarily a portion of the same for the deposit of necessary building material. Such use, however, being exceptional and foreign to the purposes for which the thoroughfare was laid out and maintained, the city must exercise vigilance, to the end that no traveler is harmed by such encroachment.

(Syllabus by the Court.)

ERROR by defendant from Wyandotte county court of common pleas. *Affirmed.*

T. A. Pollock and *F. D. Hutchings*, for plaintiff in error.

Angevine & Cubbison, for defendant in error.

SMITH, J. Nellie McDonald recovered a judgment in the court of common pleas against the defendant below for $7,500, by reason of the wrongful acts, neglect, and default of the city in causing the death of her husband. Andrew J. McDonald was a member of the fire department of Kansas City, Kan., and the driver of a hook and ladder wagon. On the night of August 10, 1896, in responding to an alarm of fire in the south part of the city, while driving at a high rate of speed, the truck upon which he was riding ran against and upon an obstruction in the roadway, consisting of a pile of rocks from 18 inches to 2 feet high and 40 feet long, extending into the street about 12 feet from the west curb. The violence of the collision threw McDonald forward upon the rocks, and he

Case Stated.

†See *notes*, 1 Mun. Corp. Cas. 58 and 474.

*See note at end of case.

was instantly killed. William Clarke, captain of the truck, was riding with McDonald at the time of the accident. The obstruction mentioned was in front of some houses then building, and the rock was for use in their erection. There was at the time an ordinance of the city in force providing that persons engaged in the construction of any building might occupy so much of the street in front thereof necessary for the purpose of depositing material for use in its construction, not over one-third of the width of the street to be so occupied. It was alleged in the petition that, by the passage of said ordinance, the city wrongfully and negligently authorized persons to obstruct the street, including South Seventh street at the place where the accident occurred, with earth, sand, gravel, stones, etc., without requiring them to place thereon guards, lights, or other danger signals to warn persons passing of the existence of such obstructions. The defendant city, among other things, pleaded in defense an ordinance as follows: "Any person who shall intentionally ride or drive any horse, mule, or other beast faster than an ordinary traveling gait in any of the streets, avenues or alleys within the city, or so drive as to endanger the safety of others, or who shall so ride or drive as to be likely to cause other teams to be frightened or run away, shall upon conviction thereof be fined in any sum not exceeding $100."

The court below sustained a demurrer to that paragraph of the answer which pleaded the ordinance as a defense, and this is the first assignment of error. It is contended that the ordinance was proper evidence to show that McDonald, by its violation, was guilty of contributory negligence. We do not think that the ordinance was intended to govern the actions of firemen or regulate the speed or fire engines or trucks. Such an intention is nowhere expressed, and, if it had been, the ordinance would have been unreasonable. Cities do not provide horses of high mettle, trained to propel speedily apparatus for the extinguishment of fires, and then

Speed of Vehicles—Whether Ordinance Applies to Fire Department.

impede them in their progress by a requirement that they shall not be driven faster than an ordinary traveling gait. Various appliances have been devised by which such horses are harnessed with incredible speed, that no time may be lost in reaching the fire with hose and other aids to prevent the destruction of property. It is of first importance that a fire be reached in its incipiency. To accomplish this purpose, the utmost haste is necessary. A compliance with this ordinance by the firemen and the enforced delay required by its terms would convert the fire department into a purely ornamental adjunct to the city government,—proficient only on parade. In Farley *v.* Mayor, etc. (N. Y. App.) 46 N. E. 506, it is said: "The safety of property and the protection of life may, and often do, depend upon the celerity of movement, and require that the greatest practicable speed should be permitted to the vehicles of the fire department in going to fires. Section 1932, c. 410, Laws 1882, was intended to regulate the speed of horses traveling on the streets, and using them for the ordinary purposes of travel, and from the nature of the exigency cannot apply to the speed of vehicles of the fire department on their way to fires." The restriction as to speed, when applied to the fire department, renders the ordinance unreasonable. Unreasonable ordinances will not be upheld by the courts. 1 Dill. Mun. Corp. § 319; Crawford *v.* City of Topeka, 51 Can. 756, 33 Pac. 476; Anderson *v.* City of Wellington, 40 Kan. 173, 19 Pac. 719; State *v.* Sheppard (Minn.) 67 N. W. 62.

A general demurrer was also sustained to the fourth paragraph of the answer of the city, which reads: "The defendant further says that under and by virtue of the provisions of chapter 363 of the Laws of 1895, and out of the funds created and provided for by said law, it purchased, on the 7th day of August, 1896, an accident insurance policy for said Andrew McDonald, in plaintiff's petition named, from the Travelers' Insurance Company, by which contract and policy said company agreed to pay, and did pay, to the plaintiff, on

Death of Fireman—Obstruction in Street—Action against City—Defenses.

account of the death of said Andrew McDonald, by reason of the causes in plaintiff's petition set forth, the sum of $2,000, which sum the plaintiff did receive and still retains." There is nothing in the act of 1895 implying that indemnity is furnished to the city against damages to the widow or next of kin of a fireman killed by its negligence. The accident policy cost the city nothing. The premiums were paid by foreign insurance corporations doing business in the state; a tax being laid by the state of two dollars a hundred upon the amount of all premiums on policies written for fire and lightning insurance within the limits of such city for each year. The law authorized the amount of the tax to be invested in the purchase of accident insurance upon the members of the fire department. The tax is collected by the state for the purposes mentioned, and the mayor and council in cities having a paid fire department are constituted its agents, charged with the duty of applying the amount of the tax to further the objects named. The demurrer to said paragraph of the answer was properly sustained. Coots *v.* City of Detroit (Mich.) 43 N. W. 17.

Evidence.

Evidence was introduced by the plaintiff below showing that at the time of the accident there was a pile of sand, cinders, and earth on the east side of the street, south of, but near, the place where the first obstruction mentioned was situated. Counsel for the city complain that the admission of this testimony tended to convey to the jury an impression that the city was unmindful of the streets, and permitted any and all persons to block them up. It was competent to show the width of the roadway in condition for travel at and near the place of the accident, as it might properly be shown that one side of the street was higher or lower than the other, and the condition in general of the surroundings. There was proof tending to show that the rocks upon which the wagon struck were of light color, similar to that of the block pavement in the

street, and hence not distinguishable from the pavement at night. Clarke, who was riding with McDonald, saw this pile of cinders and sand, and it was not improper for the jury to know of the existence of this obstruction, and to consider whether McDonald also saw it, and, in order to avoid it, was driving further west than he otherwise would have done. The jury found, in answer to a particular question submitted, that the sand and cinder pile was not one of the causes of the accident, so that the defendant below cannot be said to have suffered from the evidence complained of. Again, we cannot say that the evidence admitted in cross-examination of the witness Edmunds, showing that there was a movement on hand to reorganize the fire department, was prejudicial to the city. It would seem to be harmless in itself. We think, however, the counsel for plaintiff below went to greater lengths in his comments on this evidence before the jury than he should have done, making an application of the testimony not justified by the language of the witness. The defendant below, however, merely excepted to the language of the opposing counsel. No objection preceded this exception, and the court had made no ruling. This was insufficient. "An exception is an objection taken to a decision of a court or judge upon a matter of law." Gen. St. 1897, c. 95, § 309; Marder *v.* Leary (Ill. Sup.) 26 N. E. 1094; Pike *v.* City of Chicago (Ill. Sup.) 40 N. E. 567. In Marder *v.* Leary, *supra*, the court says: "The remark 'I except to the statement' meant nothing, in a legal sense, in the connection in which it occurred. The court had made no ruling to which it was applicable, and, if it was intended to be an objection, it was ineffectual, because it was not pressed upon the attention of the judge, and his ruling obtained thereon. Railroad Co. *v.* Fletcher, 128 Ill. 619, 21 N. E. 577."

Remarks of Counsel.

The plaintiff in error urges that the court erred in refusing to permit it to show the rules of the fire department requiring

that firemen drive in the middle of the street. If there was such a rule, its object was to insure safety to the men, teams, and vehicles when going at a rapid rate of speed in answer to an alarm of fire. A violation of any precaution affecting safety would have been equally negligent on the part of the driver, whether the exercise of such precaution was demanded by the rules or not. The condition of the street would largely determine the course to be taken, and what part of the street to be avoided, whatever the rule might be. To drive a hook and ladder wagon in the middle of those streets upon which cable-car tracks are in use, with rough stone blocks between the rails, would be exceedingly dangerous to the driver and vehicle, and render collisions with street cars probable. The fact of the existence of a rule as claimed, which McDonald violated, would not demand of him greater care. The condition of the street, as it appeared to him, should determine his course in driving, whether there was a rule on the subject or not. There are cases where a violation of a rule would be a material consideration. If a man were engaged in a dangerous employment, without an experience fitting him to determine the safer of one or two courses which he was called upon to take, then rules for his guidance, fixed by persons skilled in the particular work or business, should be followed. We have examined the instructions tendered by the city and refused by the court, and see no error in their refusal. The court instructed that McDonald was not in any manner responsible for any negligence of Clarke, the captain of the truck. They were not fellow servants. 1 Beach, Pub. Corp. §§ 741–744; 2 Dill. Mun. Corp. 977–980; Lawson *v.* City of Seattle (Wash.) 33 Pac. 347; Peters *v.* City of Lindsborg, 40 Kan. 654, 20 Pac. 490. The last case is authority for the statement that McDonald and Clarke were not servants of the city. That they were fellow servants of some one else is immaterial. But if they were fellow servants of the city, and if Clarke failed to notify McDonald of the existence of rocks in the

Rules of Fire Department—Evidence.

street, and if he was guilty of negligence in not doing so, and if his failure to give such notice contributed to the death of McDonald, yet the negligence of the city was the primary and proximate cause, without which the accident would not have occurred, and the negligence of Clarke the remote cause. The claim that the death of McDonald was caused by the negligence of a fellow servant, and that the city is not therefore liable, is untenable. We do not see how the failure of Clarke to notify McDonald of the danger can affect the city's liability. The negligence or omission of a stranger to notify McDonald could not excuse the municipality from the consequences of its own negligence. The court below held, and so instructed the jury, that McDonald was a lawful traveler upon the streets, and, as such, the city owed the duty towards him to keep and maintain its streets in a reasonably safe condition for public travel,—in fact, that he was entitled to the same protection as an ordinary traveler upon the highway. This ruling was correct. Coots *v.* City of Detroit, 75 Mich. 628, 43 N. W. 17; Palmer *v.* City of Portsmouth, 43 N. H. 265; Farley *v.* Mayor, etc. (N. Y. App.) 46 N. E. 506. In Coots *v.* City of Detroit, *supra*, it is held that a fireman is not held to that degree of care and caution in driving along a public street required of a common traveler proceeding at an ordinary gait.

Duty to Maintain Streets in Safe Condition—Degree of Care Due Firemen.

The defendant below requested the court to submit to the jury 78 particular questions of fact, 35 of which were refused. Many of the questions were immaterial, and some were repetitions of others. While it is the duty of the court to submit to the jury questions pertinent to the issues, we think the court performed that duty in this case.

As to the verdict being excessive, while the jury are restricted to the pecuniary loss suffered by the widow or next of kin, yet they are not confined, in estimating the damages, to any exact mathematical calculation, but are invested with considerable discretion, with which the courts will not interfere unless it has been abused. Considering the age and

capacity for earning wages possessed by the deceased, his relations to his family, and his habits of life, we cannot say that the amount of the verdict was unreasonable. The case was carefully tried by the learned judge of the court below, and all legal rights of the defendant protected.

The ordinance permitting a use of a portion of the street for the deposit of building material thereon was not invalid. Dill. Mun. Corp. (4th Ed.) § 730. In the absence of such ordinance, a license thus to encroach upon the street might be implied, and a temporary occupation be lawful, from the necessities of the case, when buildings fronting on the street were being erected. Yet such use being exceptional, and foreign to the purposes for which the thoroughfare was laid out and maintained, the duty devolved upon the city to exercise vigilance with respect to the rights of a traveler who might be harmed by such obstructions in his way.

Obstructing Street with Building Material—Duty of City.

Several questions raised in the brief of the plaintiff in error are not discussed in this opinion, but we have examined the same and find nothing substantial in the claim of error. The negligence of the city was clearly shown. It suffered one of its principal thoroughfares to be obstructed in a place likely to occasion injury to persons having a right to travel thereon, and permitted this obstruction to remain unguarded and without lights or warnings to prevent accidents in the night-time, in disregard of a lawful duty imposed upon it. The judgment of the court below will be affirmed. All the justices concurring.

NOTES.

Ordinance Regulating Speed—Applicability to Fire Department.—In Morse *v.* Sweenie, 15 Ill. App. 486, the court held that an ordinance forbidding fast driving was applicable to the fire department.

Defective Streets—Pension to Retired Firemen—Right of Action for Injuries.—A provision in a city charter, that any person who may be totally disabled in the discharge of his duties as a fireman may be placed on the list of retired firemen by a vote of the fire commission, and shall receive one-half of his annual salary there-

after, is only permissible, and does not affect the right of action of a fireman against the city for injuries sustained by him through the negligence of its officers, when no steps have been taken to retire him, and especially when he entered the service prior to the enactment of the provision. Coots *v.* City of Detroit (Mich.), 25 Am. & Eng. Corp. Cas. 250.

Use of Street by Abutter for Deposit of Building Material.—Building materials may be temporarily deposited in the street in front of his property by an abutting owner. Raymond *v.* Keseberg, 84 Wis. 302; O'Linda *v.* Lothrop, 21 Pick. (Mass.) 297; Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Palmer *v.* Silverthorn, 32 Pa. St. 65; Wood *v.* Mears, 12 Ind. 515, 74 Am. Dec. 222; Mallory *v.* Griffey, 85 Pa. St. 275.

WHEELER

v.

CITY OF BOONE.

(*Supreme Court of Iowa, April 8, 1899.*)

Use of Sidewalks—Whether Ordinance against Bicycles Applies to Tricycles.—A city ordinance prohibiting the use on its sidewalks of "all varieties of vehicles known by the general term 'bicycles'" does not prohibit such use of tricycles.

Defective Sidewalk—Injury to Tricycle Rider—Liability of City.—If a city is negligent in failing to keep a sidewalk in suitable condition for people to walk over, and a person, while riding on a tricycle, in the exercise of due care, is injured because of such neglect, there may be a recovery againt the city.

Same—Ordinances.—In an action for an injury to a boy, resulting from a defective sidewalk while he was riding a tricycle upon it, the court properly rejected, as inapplicable, an ordinance reading as follows: "Whoever shall lead, ride, or place any beast of burden, or vehicle, on any sidewalk * * * , or shall allow the same to stand or remain upon any street crossing, * * * , shall be guilty of a misdemeanor."

Damages—Future Suffering—Instructions.—In such action it was reversible error to give an instruction as to damages submitting the question of future pain and suffering, which was warranted neither by the pleadings nor the evidence.

Wheeler *v.* Boone

APPEAL by defendant from Boone county district court. *Reversed.*

Whitaker & Dale, for appellant.
R. F. Jordan, for appellee.

GRANGER, J. 1. The plaintiff, Earl Wheeler, is a boy 14 years of age, and is afflicted by a stiffening of the muscles and joints, through what is called "callositation." Because of this, he is moved about in a tricycle. Case Stated. About April 8, 1897, he was going to school with his brother, a boy 2 years his junior, to draw or push the tricycle; and on one of the walks of defendant city, because of a defect in the walk, he was thrown from the tricycle and injured; and this action is for the damage suffered. The walk on which the accident occurred was four feet in width, made of boards placed on three stringers. The defect, as shown, was in one of the boards, about eight inches wide, being broken so that on one side of the walk it was from 1½ to 2 inches below the surface; and, when stepped upon, it would go down, and then spring back, so as to be as we have described. This was at a place where the walk descended in the direction the boys were going; and it appears from their testimony that they were going quite fast down the hill, and the younger brother, who had been pulling the vehicle with a rope, because of its speed left the front, and went behind it to hold it back; and, just as he reached there, the front wheel went into the hole in the walk, and Earl fell out and was injured. It is urged to us that the evidence does not justify a finding of negligence on the part of the city, nor that the boy was injured because of the defect in the walk. We cannot agree with appellant as to either. We would be better satisfied with a finding for the city on both questions, but it is not to be well said that there is not a substantial conflict, as to both propositions, in the evidence. As to the condition of the walk, and how long it had been out of repair, there was affirmative proof that the walk had been for some time—two months or less—in the condition we

have described, so that the city, in exercise of ordinary care, would have known it. There is a strong showing, from those who used the walk, and ought to have known of the defect, if it was there, that they did not know of it; but, with the affirmative proof of the fact, this want of knowledge does not destroy the conflict. As to how the injury occurred, the boys both say the wheel of the tricycle went into the hole, and Earl was thrown out. It is true, they do not agree as to some particulars that might be considered in weighing the evidence, but nothing so overcomes their statements as to nullify the finding of the jury.

Use of Sidewalks—Whether Ordinance against Bicycles Applies to Tricycles.

2. The city has an ordinance prohibiting the use of its sidewalks of "all varieties of vehicles known by the general term 'bicycles.'" Defendant offered the ordinance in evidence, and it was rejected, and rightly so, for it was immaterial; a tricycle not being a bicycle. Nor are they known by the general term "bicycle." It is probably true that both are vehicles, but the ordinance is not against the use of vehicles, unless they come under the general term "bicycle."

Same—Ordinances.

3. The court also rejected, as evidence, an ordinance as follows: "Whoever shall lead, ride, or place any beast of burden, or vehicle, on any sidewalk or footway, otherwise than going in or out of premises owned or occupied by himself or his employer, or shall allow the same to stand or remain upon any street crossing, to the inconvenience of persons, shall be deemed guilty of a misdemeanor." The ruling was right. There is no more reason to think the ordinance was intended to prohibit the use of a tricycle, as this was made, than the use of a baby cab or invalid chair on wheels. It is very clear that it has no reference to vehicles used and propelled by individuals, like bicycles or tricycles. The court also excluded an ordinance prohibiting riding or driving other than between the curb lines of the street, but the ordinance was manifestly intended to prohibit riding or driving beasts other than between the curb lines. This conclusion arises from

construing the several provisions together. The ordinance as to bicycles was evidently intended to cover the subject of vehicles of that general nature. Whatever may be said as to general rules of law prohibiting vehicles, including bicycles, on sidewalks, we have yet to learn of any general or local law prohibiting the use of carriages operated by hand on sidewalks for the convenience of those unable to walk; and no law should be given such effect by construction.

4. The court instructed that while the city was required to keep its walks in reasonably safe condition for pedestrians exercising reasonable care, it was not required to keep them in safe condition for people riding thereon in tricycles, and, as the accident in this case occurred while plaintiff was on a tricycle, the liability of the city must be tested by the same rule that would obtain had plaintiff been walking, and then been injured; that is, if the city was negligent in failing to keep the walk in suitable condition for people to walk over, and plaintiff, while riding on the tricycle, in the exercise of due care, was injured because of such neglect, he could recover. We think the rule a correct one. It differs from the oft-expressed rule only in this: that persons who have a right to ride on the sidewalks in such vehicles may rely, the same as footmen may, on the walks being in a suitable condition for people to walk over, and have the same rights in case of injuries resulting from neglect. Such a rule places no additional burden on the public, and seems to be just as to the individual.

Defective Sidewalk—Injury to Tricycle Rider—Liability of City.

5. A complaint as to the fourteenth instruction given by the court is without merit. There is also a complaint as to the fifteenth instruction given. After verdict, the court permitted plaintiff to so amend the petition as to claim damages for further pain and suffering. The court had, by its instructions, already permitted such a recovery, if the jury found for plaintiff, and error is now assigned on the giving of the instruction; and it is said the evidence was not such as to warrant the

Damages—Future Suffering—Instructions.

amendment, or a recovery for mental and physical pain in the future, unless the allegation of permanent injury would, by implication, include that of future pain. The petition contains no such averment, and, in argument, appellee attempts to sustain the instruction as given on that theory. The petition contains an express allegation of physical and mental pain which plaintiff has suffered, but no averment that he will so suffer in the future. The case seems to have been tried on that theory, except as to the instruction given by the court; and it does not appear that the parties had in view such an issue until the question arose after verdict, when, to meet the conditions, the amendment was filed. The cause is to be reversed, and what we have said will be sufficient to avoid any difficulty on another trial on this branch of the case. It is explicitly charged in argument that there is no evidence as a basis for a recovery for future pain, and appellant sets out the evidence to show that there could be no such a recovery. Appellee in no way attempts to meet this, and we find no evidence on which damages of this character could rest. So far as we find evidence bearing on that question, it is against even a probability of such suffering. It is true that he will suffer pain pecause of his former ailment, and would but for his injuries complained of. If there is any evidence from which it could be found that the injuries would increase his suffering after the trial, we do not discover it; and we think, if there was such, it would have been, in view of appellant's claim, pointed out. The injury was early in April, and the trial was the first days of October following, when he seemed to be well of his injuries, in so far as they would cause him pain. It is true that there remained a permanent enlargement of the bone of the leg, but it does not appear that it would be painful. For the error in submitting the question of future pain and suffering, the judgment must stand reversed.

HENDERSON BRIDGE CO. *et al.*

v.

CITY OF HENDERSON.

(*Supreme Court of the United States, April 3, 1899.*)

Jurisdiction of the Supreme Court—Federal Questions.—Where it appears that the state court expressly waived any decision upon the plea of *res judicata*, and reconsidered and discussed the main question suggested by the defense, namely, that the federal constitution forbade the assessment for taxation for state and municipal purposes of that part of certain bridge property between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio river, the supreme court of the United States has jurisdiction to review the final judgment of the state court for the purpose of ascertaining whether it deprived defendants (the bridge company, and a railroad company which had agreed to pay taxes on the bridge property) of any right, privilege or immunity specially set up by them under the federal constitution.

State Boundaries.—The boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio river.

Taxation—Municipal Corporations.—If the commonwealth of Kentucky could tax for state purposes the bridge property, so far as it was between low-water mark on the Kentucky shore and low-water mark on the Indiana shore, it could confer upon one of its municipal corporations the power to tax the same property for local purposes.

Same—Same—Bridge Property beyond Low-water Mark—Constitutional Law.—Where the state court has rejected the idea that such bridge property outside of low-water mark is so far beyond the reach of municipal protection by the authorities of the city of Henderson, situated in Kentucky, that it cannot be said to receive any benefits whatever from the municipal government, the supreme court of the United States will not adjudge that view to be so clearly untenable as to entitle such defendants to invoke the principle that private property cannot be taken for public use without just compensation.

Same—Same—Same—Same.—As the boundary and jurisdiction of Kentucky extends to low-water mark on the Indiana side of the

Ohio river, and the city of Henderson was authorized by the state of Kentucky to exert its power of taxation as to all property within its statutory boundary, which extended to the low-water mark on the Ohio river on the Indiana shore, the taxation by the city, as property, of the bridge and its appurtenances within the fixed boundary of the city, between low-water mark on the two sides of the Ohio river, was not a taking of private property for public use without just compensation, in violation of the federal constitution.

Same—Same — Same — Same—Construction of Charter.— There was no ground for the contention of the defendants that the acceptance by the bridge company of its charter, and the construction of the bridge under it, created a contract between the company and the state, whereby the bridge structure north of low-water mark on the Kentucky shore of the river was exempted from taxation for any local purpose, and that the tax ordinances of the city, on which the taxation in question was based, impaired the obligation of that contract, and for that reason were repugnant to the federal constitution; as the bridge company did not acquire under its charter an exemption from local taxation in respect of its bridge situated between low-water mark on the two shores of the Ohio river.

Exemption from Taxation—Construction of Municipal Grant.—It was expressly stipulated in the grant from the city to the bridge company that it should not be construed "as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or any building erected by said bridge company within the corporate limits of said city;" and the grant contained nothing else on the subject of taxation. *Held*, that the grant showed no purpose on the part of the city to waive any right it possessed, or might acquire, to tax property for municipal purposes; and that an exemption from taxation cannot arise from mere implication.

Contracts—Rights of Third Party.—No contract between the bridge company and the railroad company could stand in the way of the city exerting, as between itself and the bridge company, any power of taxation it legally possessed.

Municipal Taxation—Construction of Charter.—The provision of the city's charter forbidding the taxation of lands not divided into lots of five acres or less does not apply to a bridge over the Ohio river within the city's limits.

Issues.—This case did not require any decision of the supreme court as to the extent and character of the jurisdiction which may be exercised over the Ohio river by the states whose boundaries come to low-water mark on its shores opposite Kentucky.

Taxation—State Powers.—The state of Kentucky has authority to tax such bridge, although the state does not own the soil in the bed

of the river upon which the bridge piers rest; the fact that it was erected in and over the Ohio river under the authority or with the consent of congress being immaterial in this connection.

Same—Same—Instruments of Interstate Commerce.—Nor does the fact that the bridge between low-water mark on either side of the river is used by the railroad company for purposes of interstate commerce exempt it from taxation by the state within whose limits it is permanently located.

ERROR by defendants to the Court of Appeals of the State of Kentucky. *Affirmed.*

Malcolm Yeaman and *Wm. Lindsay*, for plaintiffs in error.

James W. Clay, for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

Case Stated.

This case arises out of the taxation by the city of Henderson, a municipal corporation of Kentucky, of a railroad bridge (with its approaches, piers, etc.) extending from a point within that city, on the Kentucky shore, across the Ohio river, to low-water mark on the Indiana shore.

The property subjected to taxation belongs to the Henderson Bridge Company, a corporation of Kentucky, but is under the care, management, and control of the Louisville & Nashville Railroad Company, also a corporation of that commonwealth.

Those corporations insist that the final judgment of the court of appeals of Kentucky, here for review, affirming a judgment rendered in the circuit court of Henderson county, is in derogation of rights secured to them by the constitution of the United States. The grounds upon which this contention rests will appear from the statement presently to be made of the history of the litigation between the city of Henderson and the corporations named, in respect of taxes assessed upon the bridge property in question.

The city contends, not only that the assessment of taxes upon this property was in all respects valid, but that the matters here in dispute, including the questions of constitu-

tional law raised by the bridge and railroad companies, have been conclusively determined in prior litigation between the parties.

The facts which it seems necessary to state, in order to bring out clearly and fully the various questions raised by the pleadings and discussed by counsel, are as follows:

The Henderson Bridge Company was incorporated by an act of the general assembly of the commonwealth of Kentucky approved February 9, 1872, with authority to construct "a bridge across the Ohio river, extending from some convenient point within the corporate limits of the city of Henderson to some convenient point on the Indiana side of said river, opposite the city of Henderson." 1 Acts Ky. 1871–72, p. 314.

The city's boundary, as defined by its charter granted February 11, 1867, extended "to low-water mark on the Ohio river on the Indiana shore," and it had the power (with certain exceptions not material to be noticed here) to levy and collect taxes at a prescribed rate upon all property within its limits made taxable by law for state purposes.

In 1882 an ordinance was passed by the common council of the city granting to the Henderson Bridge Company the right "to construct on or over the center of Fourth street in the city of Henderson, and of the line thereof extended to low-water mark on the Indiana side of the Ohio river, such approaches, avenues, piers, trestles, abutments, toll houses, and other appurtenances necessary in the erection of, and for the business of, a bridge over the Ohio river, from a point in the city of Henderson to some convenient point on the Indiana side of said river, and for such purposes the use of said Fourth street is hereby granted, subject to the terms and conditions hereinafter expressed"; also, the right "to use the space between Water street, in said city, and low-water mark in the Ohio river, extending one hundred feet below the center of Fourth street extended and three hundred feet above the center of said street extended to the Ohio river for the purpose required by said company." The company was also permitted to "erect, or authorize or cause to be

erected, grain elevators within said space above high-water mark, and may construct therefrom to the river such apparatus and machinery as may be necessary to convey grain from boats to such elevators, and may have the use of said space for the landing of boats laden with freight for such elevators, and construct floating docks or use wharf boats within such space for the accommodation of such boats and the conduct of the business of such bridge and of the said elevators free of wharfage, subject to the terms and conditions hereinafter expressed."

The fourth section of that ordinance declared that it should not be construed "as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or any building erected by said bridge company within the corporate limits of said city, the bridge itself, and all appurtenances thereto, within the limits of said city."

The fifth section provided that, before any of the rights or privileges so granted should inure to the benefit of or vest in the bridge company, the latter should, by proper authority, append to a certified copy of the ordinance their acceptance of, and agreement to abide by and faithfully keep, its terms and conditions, such acceptance and agreement to be acknowledged by the proper authority of the company, as provided in the case of a deed under the laws of Kentucky, and delivered to the clerk of the Henderson city council.

The bridge company duly accepted the ordinance, with its terms and conditions, agreed to abide by, and faithfully keep, the same, and its acceptance was acknowledged and delivered to the city council.

In 1884 an agreement in writing was entered into between the bridge company and the Louisville & Nashville Railroad Company, reciting that the former was about to proceed with the erection of a bridge over the Ohio river at or near Henderson, and of a railroad connecting the Henderson Division of the Louisville & Nashville Railroad Company at Henderson with the Southeast & St. Louis Railway in or near Evansville, Ind.; that certain railroads, including the Louisville &

Nashville Railroad Company, had by agreement guarantied to the bridge company an income from traffic amounting to $200,000 per annum; and that it was deemed for the interest of all parties, and had been requested by the bondholders under the mortgage placed on the bridge, that the Louisville & Nashville Railroad Company should assume the control, management, and care of the track of said railroad so to be constructed, and should effect the usual repairs to such bridge caused by ordinary wear and tear, and pay taxes imposed on said track and the bridge on compensation being made therefor by the bridge company. By that agreement the bridge company undertook to pay the railroad company absolutely and in each year during the continuance of the agreement, in equal quarter-yearly payments, the sum of $10,000 per annum, which amount, or such parts thereof as were required, the railroad company agreed to apply to the maintenance of the track and roadbed of said railroad in good condition and repair, and towards the usual and ordinary repairs of the bridge, and also to pay all taxes imposed on said track or bridge structure and each of them.

On the 8th day of December, 1887, the city, by petition filed in the circuit court of Henderson county, Ky.,—that mode of collecting taxes being authorized by the local law,—brought suit against the Henderson Bridge Company to recover the sum of $44,324 as the amount of taxes, with penalties thereon, due from the bridge company under ordinances passed by the city in 1885, 1886, and 1887, levying and assessing taxes for certain purposes. The petition referred to the above ordinance authorizing the construction of the bridge, and among other averments in it were the following:

"The defendant commenced the construction of said bridge in the year 1883, and completed same in the month of July, 1885, and at a cost of about $2,000,000, and on the —— day of July, 1885, the first train ran over said bridge. The approach to said bridge is constructed over Fourth street, near the principal portion of said city, commencing at the west line of Main street, and extending to the main structure of

said bridge at Water street (though, plaintiff claims, not in accordance with the terms of said ordinance). The rights and privileges granted by the plaintiff to the defendant were of great value, and the plaintiff was influenced and induced to so grant them by the belief in the right on the part of the plaintiff to tax said bridge as other property is taxed within the city limits. By the building of said bridge through the rights and privileges so granted by the plaintiff, the system of roads north of the Ohio river has been connected with the Louisville & Nashville Railroad south of the river, and the said bridge company's property has become so valuable that its bonds, to the amount of about $2,000,000, are worth a premium of 8½ per cent."

The assessment against the bridge company on account of the bridge and its approaches was upon a valuation of $600,000 in 1885, and $1,000,000 in each of the years 1886 and 1887. In its petition the city claimed a lien upon the bridge from the beginning of its approach at Main street, in the city of Henderson, to low-water mark on the Indiana side of the Ohio river, for said taxes and the penalties thereon.

The bridge company in its answer denied the material allegations of the petition, and alleged:

That the city had no authority to levy taxes for the purposes indicated in the ordinances referred to;

That the declaration in the ordinance granting the right to construct the bridge within the city's limits meant, and was intended to mean, nothing more than that the city did not waive any right to tax then possessed by it;

That the bridge was built only for the purpose of laying a single railroad track on which to move locomotives and cars between Kentucky and Indiana over the Ohio river;

That except as to that part of the bridge commencing at the west line of Main street, in the city of Henderson, and extending to the main structure at Water street, the bridge company derived no assistance or protection from the city, and that part between the Kentucky and Indiana shores,

upon stone piers and pillars resting upon the bed of the Ohio river, was not subject to taxation by the city;

That the bridge was located and constructed in conformity with the two acts of the congress of the United States, the one entitled "An act to authorize the construction of bridges across the Ohio river and to prescribe the dimensions of the same," approved December 17, 1872, and the other entitled "An act supplemental to an act approved December 17, 1872, entitled 'An act to authorize the construction of bridges across the Ohio river and to prescribe the dimensions of the same,'" approved February 14, 1883 (17 Stat. 398, c. 4; 22 Stat. 414, c. 44);

That the whole of said bridge between the Kentucky shore and the Indiana shore, 1,968 feet in length, was over the water of the Ohio river, except the piers or pillars that support it;

That the Ohio river was a navigable stream within the entire control and jurisdiction of congress and the courts of the United States, and that assumption of control by the city of that part of the bridge for purposes of taxation, or for any purpose, except for executing writs from its police authorities, would be in violation of the constitution of the United States, the laws of congress, and the rights of the defendants; and

That, as the bridge derived no profit, protection, or advantage from the government of the city, to subject it to city taxation would be to take private property for public use without just compensation, in violation of the constitution of the United States as well as of the constitution and laws of Kentucky and of the defendant's rights in the premises.

The answer of the bridge company further alleged:

That the Louisville & Nashville Railroad Company was a necessary party to that suit;

That when it constructed its bridge it was the settled law of Kentucky, as shown by the judgment of the court of appeals of Kentucky in Louisville Bridge Co. *v.* City of Louisville, 81 Ky. 189, that the part of the bridge erected over and

Henderson Bridge Co. *v.* City of Henderson

across the Ohio river was not liable to municipal taxation;

That, relying upon such being the law of Kentucky, the defendant and the Louisville & Nashville Railroad Company entered into the above agreement of February 27, 1884; and

That to grant to the plaintiff the relief prayed for, or any part thereof, would be a direct impairment of the contract between the bridge company and the railroad company.

The railroad company, having been made a party, adopted the answer of the bridge company.

The state circuit court adjudged that, the bridge being in an incomplete condition on the 10th day of January, 1885, the city was not entitled to tax it for that year. But, as to the years 1886 and 1887, it was adjudged that the bridge, and the approach thereto, were subject to taxation for all the purposes and for the amounts claimed in the city's petition; and that the city had a lien upon the bridge structure, masonry piers, and the approach thereto, situated within its boundary extending to low-water mark on the Indiana side of the Ohio river, for the taxes assessed for the years 1886 and 1887, with interest and costs expended. The bridge company was directed to pay said sums, with interest and costs, to the plaintiff on or before a named day.

In a brief opinion of the state circuit court, it was said that the taxable boundary of the city was co-extensive with its statutory boundary. Referring to the case of Louisville Bridge Co. *v.* City of Louisville, 81 Ky. 189, the court held that that case decided nothing more than that the legislature did not intend that the bridge there in question should be subject to taxation. It was further said: "Several cases are relied on where the court of appeals have relieved parties from the payment of taxes on agricultural lands when the city limits had been extended without the owner's consent. The rule, if one has been established by those cases, should not be extended to cases where property has been voluntarily brought within such boundaries. The party thus bringing in his property should be treated as one who sanctioned the extension of a city so as to include his agricultural lands.

All that can be deduced from these cases is that in each extension of a town or city the court will hear the complaints of any taxpayer, and grant or not grant him relief, as the merits of his particular case may demand. In this case the defendants voluntarily placed their property within the legally established limits of the city, and should pay the taxes assessed on other property holders of the city after 1885."

The bridge company and the railroad company prosecuted an appeal to the court of appeals of Kentucky, and the city was granted a cross appeal from so much of the judgment as disallowed its claim of taxes for 1885.

In the court of appeals of Kentucky the judgment was affirmed. 14 S. W. 495. In its opinion it is apparently conceded that the city could not, under its charter, tax the bridge structure over the river for ordinary municipal purposes; that is, "for the support of its government proper." But it was said that if the city was created a taxing district it could do so. Referring to the contract or terms upon which the bridge company acquired the right to construct its bridge within its limits, and particularly to the clause declaring that the ordinance should not be construed as waiving the right of the city to tax the bridge and its appurtenances within the corporate limits of the city, the court said:

"The appellant contends it was only meant to reserve the right to tax such property of the appellant as was theretofore subject to taxation by the city government, and, as that part of the bridge situated on the water of the Ohio river was not, for the reason above indicated, subject to taxation, the reservation relates to that part of the bridge, etc., that the appellee had the right to tax under the law. It is evident that the contract was well considered and prudently drafted by men skilled in that kind of work, and it is not presumed that they engaged in a mere *nudum pactum*, but they meant to set forth a business transaction. Now, that business transaction was evidently this: The appellant desired rights and privileges that it did not possess, and which it could not

possess, without the consent of the appellee. So, it said to the appellee: Grant these privileges, and you may tax what? Only the approach to said bridge? No; because the appellee already had the right to tax that, and it had made no concessions that could possibly be construed as waiving that right. What right, then, was granted? Why, the right to tax the 'bridge itself.' The bridge, as distinguished from its abutments and approaches, is that part that is over the water. Now, the appellee, according to the Louisville Bridge Case, in its municipal capacity had no right to tax that part of the bridge over the water. Why, then, say that it did not waive the right to tax it? To waive a right, there must be a claim of right to waive. Well, it is said, as the appellee had no right to tax the bridge, there was in fact no right to waive. As an abstract proposition of the right to tax the bridge on the water (according to said case), this contention is true; but it is equally true that the appellee had the right, if asserted and agreed to, to claim that the bridge should be taxed in consideration of the privileges granted. This claim of right, it must be presumed, was asserted and agreed to and expressed in the contract by the term, 'not waiving the right.' If the contract does not mean this, then it means nothing. It is not supposed that the contracting parties only meant to reserve a right that they already had, and about which there was no possible ground of dispute; but when it is considered that the right to tax the bridge to the Indiana shore might be legitimately obtained by contract, and that the appellee granted to the appellant rights and privileges essential to its enterprise, designed to make money, and is making a large per cent., it is entirely reasonable to suppose that the appellee would contract for the right to thus tax the appellant in consideration of granting these essential rights and privileges, by which the appellant acquired the right to construct and operate so profitable a business enterprise. So, it seems much more reasonable to suppose that the contracting parties intended to do this reasonable thing, to wit, to receive some

consideration for the grant of privileges, rather than indulge in a mere *nudum pactum*. The appellant, at least, for the purpose of collecting taxes, should be considered as a part of a railroad; consequently, falls within the principle announced in Elizabethtown & P. R. Co. *v.* Trustees of Elizabethtown, 12 Bush, 239," 14 S. W. 493.

CHIEF JUSTICE HOLT delivered a separate opinion, in which he said: "The legislature, by authorizing the imposition and collection of the railroad and school taxes upon the real estate within the city limits, created a taxing district. The power to collect these taxes was therefore conferred upon the appellee as such a district, and the appellant's property, being within it, is liable for them. As to the municipal taxes proper, the appellant's property is within the corporate limits, and, in my opinion, receives such benefits from the municipal government as render it both legally and justly liable for them." 14 S. W. 493.

The bridge company and the railroad company sued out a writ of error from this court, but the writ was dismissed upon the ground that, although a federal question may have been raised in the state court, the judgment of the latter court rested upon grounds broad enough to sustain the decision without reference to any such question. MR. JUSTICE BLATCHFORD, delivering the opinion of the court, said: "The opinion of the state court is based wholly upon the ground that the proper interpretation of the ordinance of February, 1882, was that the bridge company voluntarily agreed that the bridge should be liable to taxation. This does not involve a federal question, and is broad enough to dispose of the case without reference to any federal question. This court cannot review the construction which was given to the ordinance as a contract by the state court. There is nothing in the suggestion that the taxation of the bridge is a regulation of commerce among the states, or is the taxation of any agency of the federal government. The case of Louisville Bridge Co. *v.* City of Louisville, 81 Ky. 189, was not decided until May, 1883, more than a year after the ordinance of the city of

Henderson was accepted by the bridge company, in February, 1882. The contract of February 1884, between the bridge company and the railroad company, was made more than two years after the ordinance of February, 1882, came into existence. Neither the opinion of the court of appeals in the present case, nor that of CHIEF JUSTICE HOLT, nor that of the circuit court of the state, puts the decision upon any federal question; and, on this writ of error to the state court, we are bound by its interpretation of the contract contained in the ordinance, in view of the constitution and laws of Kentucky, and cannot review that question." Henderson Bridge Co. *v.* Henderson City, 141 U. S. 679, 689, 12 Sup. Ct. 118.

By an act of the general assembly of Kentucky approved April 9, 1888, the charter of the city of Henderson was repealed, and the city reincorporated, with the following boundaries: "Beginning at a stone on the west side of the Madisonville road; thence north 48 deg. 35 min. east, five thousand six hundred and forty-one feet to a stone near the Whitebridge on the Henderson and Zion gravel road; thence in a straight line north 11 deg. 35 min. west to the dividing line of the ten-acre lots Nos. 4 and 5; thence with the dividing line of said lots north 71 deg. west to low-water mark on the Ohio river on the Indiana shore; thence down the river with the meanders thereof at low-water margin to a point opposite the south line of Hancock street; thence across said river south 59 deg. east along the south line of said Hancock street in a straight line to the beginning." 2 Acts Ky. 1887–88, p. 937. That act, as did the original charter of the city, gave the common council power, within the limits of the city, to levy and collect taxes at a prescribed rate upon all property in the city subject to taxation under the revenue laws of the state for state purposes, with certain exceptions, which need not be stated.

The common council, by an ordinance passed in 1888, and providing for the annual tax levies for that year, imposed an *ad valorem* tax "on all property within the limits of the city

of Henderson subject to taxation under the present revenue laws of the state of Kentucky for state purposes, to be paid by the owners of said property, respectively: provided, however, that no land embraced within the city limits, and outside of the ten-acre lots as originally laid off, shall be assessed and taxed by the council, unless the same is divided and laid off into lots of five acres or less, and unless all of same is actually used and devoted to farming purposes." Similar ordinances were passed providing the annual tax levies for the fiscal years 1889 and 1890. As appears from the ordinances, these taxes were laid for the purpose of raising money sufficient to pay interest on the city's bonded indebtedness, defray the ordinary expenses of the city government, and meet the annual expenses of the public schools of the city.

Under the above ordinances, the city caused the bridge in question to be assessed by the city assessor for taxation to low-water mark on the Indiana side of the Ohio river, as other property in the city, for the years 1888, 1889, and 1890, at a valuation of $1,000,000 for each of those years.

The present suit was instituted by the city against the bridge company and the Louisville & Nashville Railroad Company to recover the amount of taxes for the years 1888, 1889, and 1890 alleged to be due under the above assessments. It is not disputed that those assessments embraced the bridge and its piers between low-water mark on the Kentucky side of the Ohio river and low-water mark on the Indiana shore.

During the progress of the cause the plaintiff dismissed its suit so far as it related to taxes for the year 1890, without prejudice to any future action by it to recover those taxes.

The bridge company filed its answer, in which, after stating some grounds of defense which did not specifically rest on the constitution or laws of the United states, it was averred:

That when it accepted its charter it was the settled law of Kentucky, and had been for more than 40 years, as de-

clared in many cases by its highest court, that real estate within the boundaries of a town or city could not be taxed for municipal purposes unless it was capable of being profitably used and converted into town property, and also received benefits, both actual and presumed, from the municipal government seeking to tax such property;

That the defendant constructed its bridge on the faith of the law of the commonwealth as thus long established, and that the law thus established became a part of the contract between Kentucky and the defendant growing out of the granting and acceptence of its charter;

That it was also the settled law of Kentucky, when the bridge in question was constructed, that, in the case of bridges across the Ohio river from a point in a city or town whose boundary extended to low-water mark on the northern shore of the Ohio river, a city or town had no power or authority, under a charter, duly enacted, authorizing the taxation of property by the municipal government within its corporate boundary, to tax such bridge beyond low-water mark on the Kentucky or southern side of said river;

That a city boundary fixed at low-water mark on the Indiana shore was not, in the meaning and intent of the legislative act so fixing it, intended to define the taxable boundary of the city, but only to confer upon the city jurisdiction for police purposes upon the waters of the river to the Indiana shore, and that it was further settled by the court in the case of Louisville Bridge Co. *v.* City of Louisville, 81 Ky. 189, that such an act, if intended to confer a taxing power over property erected in said stream beyond the low-water mark on the Kentucky side, was in violation of that provision of the constitution of this state which prohibits the taking of private property for public purposes without just compensation, and of the like provision of the constitution of the United States, and would, to the extent it conferred on the city such power, be absolutely null and void, and that the city could not tax said property for waterworks, school, or railroad purposes, nor for any municipal purposes whatever;

That the defendant, relying upon the law as thus established, went forward, and built its bridge to low-water mark on the Indiana shore of the Ohio river, and the legislative acts and city ordinances pleaded by plaintiff as authority for the collection of the tax upon that part of the bridge beyond low-water mark of the Ohio river on the Kentucky shore have all been passed since the law of Kentucky was settled as above stated, and are null and void, as contrary to that provision of the constitution of the United States forbidding any state to pass a law impairing the obligation of contracts, and as contrary to those constitutional provisions, state and federal, that prohibit the taking of private property for public uses without just compensation;

That the above legislative acts and ordinances constitute the only authority the plaintiff has for the assessment of defendant's property, or the levy and collection of the taxes thereon sued for herein, and the said act of April 9, 1888, which constituted the only authority the city of Henderson has to levy or collect taxes for any purposes or upon any property, and the alleged city ordinances of May, 1888, and of April 24, 1889, and of May 24, 1890, were each and all passed and ordained subsequent to the acceptance by the defendant of its charter of incorporation, and its expenditure of the large sums of money aforesaid in the construction of its bridge, and, to the extent that the said act or the said ordinances, or either of them, do or may authorize any portion of defendant's bridge structure situated north of low-water mark on the Kentucky shore to be taxed, are null and void, because repugnant to the constitution of the United States;

That the defendant has at all times been willing to pay taxes, for the purposes set out in the petition, on that portion of its bridge which is in fact, and in the sense of the legislative acts referred to, within the boundary of the city of Henderson, to wit, from the beginning of the approach on the west side of Main street to low-water mark of the Kentucky shore; and

That the taxable boundary of the plaintiff on the Ohio river is the low-water mark on the Kentucky shore.

The answer of the bridge company further averred: "The territory on both sides of the Ohio river was, prior to the year 1784, a part of the state of Virginia, in which year she ceded to the United States the territory north and west of said river. On the 18th of December, 1789, the congress of the United States passed the 'compact with Virginia,' which authorized the establishment of the state of Kentucky, and which compact defined the rights of the said state in and to the Ohio river. By the eleventh section of that compact it is provided 'that the use and navigation of the river Ohio, so far as the territory of the proposed state (Kentucky) or the territory which shall remain within the limits of this commonwealth (Virginia) lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdiction of this commonwealth and the proposed state on the river aforesaid shall be concurrent only with the states which may possess the opposite shores of said river." That by said compact, formed and ratified between the United States and the state of Virginia and Kentucky, the bed of the Ohio river, so far as it is permanently under water, is the common property of the people of the United States. That it forms a great interstate highway of commerce, in which a great part of the country has a direct interest, and cannot be made the subject of taxation by the state of Kentucky, nor any municipal government created by said state, and is by the constitution and laws of the United States under the exclusive control of the government of the United States. That said stream is a navigable stream from its source to its mouth, and the defendant's bridge sought to be taxed by this proceeding is located and built under the permission and authority of, and as required by, an act of the congress of the United States entitled 'An act to authorize the construction of bridges across the Ohio river and prescribe the dimensions of the same,' approved December 17, 1872, and another act of said congress entitled 'An act

supplemental to an act approved December 17th, 1872, entitled "An act to authorize the construction of bridges across the Ohio river and prescribe the dimensions of same, approved February 14th, 1883; " ' and the defendant submits that the plaintiff has no jurisdiction over said stream to tax any property placed therein by authority of congress, and for plaintiff to assume to tax said bridge thus situated would be violative of the constitution of the United States, the laws of congress, and of the defendant's rights in the premises."

The bridge company defended the action upon the further ground that the relief asked by the city could not be granted without directly impairing the obligation of the contract between it and the railroad company, which contract, it was insisted, was to be interpreted in the light of the law of Kentucky as it was when such contract was made, and without reference to subsequent legislative acts and ordinances inconsistent with its provisions.

The railroad company adopted the answer of the bridge company; averring, among other things that to grant the plaintiff the relief prayed for, or any part thereof, would be a direct impairment of the obligation of the contract between the railroad company and the bridge company, and a violation of the tenth section of the first article of the constitution of the United States.

The city filed a reply, in which the material allegations of the answers were controverted. It accompanied its reply with a transcript of the proceedings in the above suit between it and the bridge and railroad companies brought in 1887 to recover the taxes assessed for the years 1885, 1886, and 1887, including the proceedings in this court on the appeal prosecuted by those companies. The reply concludes: "The plaintiff says that the right of plaintiff to assess and collect the taxes sued for, against the defendant the Henderson Bridge Company, its jurisdiction thereon, and all questions raised by the pleadings in this case, except as to the passage of the ordinances alleged, are now *res judicata*; and plain-

tiff pleads and relies upon same as a bar to defendants' pleas herein, and prays as in its petition."

Judgment was rendered in favor of the city for the taxes (with interest and penalties) for the years 1888 and 1889; and it was adjudged that for the amounts found due the city "has a lien upon the bridge structure, masonry and piers [mentioned in the petition], and the approach thereto, situated within the boundary of the state of Kentucky, and extending to low-water mark on the Indiana side of the Ohio river." That judgment having been affirmed by the court of appeals of Kentucky (36 S. W. 561), the present writ of error was sued out.

1. If the state court had sustained the city's plea of *res judicata* upon some ground that did not necessarily involve the determination of a federal right, it might be that the present case would come within the rule, often acted upon, that this court in reviewing the final judgment of the highest court of a state, will not pass upon a federal question, however distinctly presented by the pleadings, if the judgment of the state court was based upon some ground of local or general law manifestly broad enough in itself to sustain the decision independently of any view that might be taken of such federal question. But that rule cannot be applied to the judgment below. Upon examining the opinion of the court of appeals of Kentucky in this case, we find that that court expressly waived any decision upon the plea of *res judicata* for the reason that some views were then pressed upon its attention that had not been presented in previous cases; and it reconsidered and discussed the main question suggested by the defense, namely, that the constitution of the United States forbade the assessment of that part of the bridge property between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio river. This court therefore has jurisdiction to review the final judgment of the state court for the purpose of ascertaining whether it

Jurisdiction of the Supreme Court—Federal Questions.

deprived the defendants of any right, privilege, or immunity specially set up by them under that instrument.

2. Whether the city of Henderson had authority to tax so much of the property of the bridge company as was permanently between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio river depends primarily upon the question whether the boundary of Kentucky extended to low-water mark on the Indiana shore. That question has been settled by judicial decisions. But it may be well to restate here the grounds of those decisions:

Pursuant to a resolution of congress passed in 1780, recommending to the several states asserting title to waste and unappropriated lands "in the western country" that a liberal cession be made by them to the United States of a portion of their respective claims, for the common benefit of the Union, the commonwealth of Virginia, by an act passed January 2, 1781, surrendered to the United States all her right, title, and claim "to the lands northwest of the river Ohio," subject to certain conditions, one of which was that the ceded territory should be laid out into states. 10 Hen. St. p. 564. The United States having accepted that cession substantially according to the conditions named, Virginia, by an act passed December 20, 1783, authorized her delegates in congress to convey to the United States all her right, title, and claim, "as well of soil as jurisdiction," to the territory or tract of country within the limits of the Virginia charter situated "to the northwest of the river Ohio." 11 Hen. St. p. 326. Such a deed was executed in 1784 by Thomas Jefferson, Samuel Handy, Arthur Lee, and James Monroe, representing Virginia; the deed describing the territory conveyed as "situate, lying, and being to the northwest of the river Ohio." On the 13th day of July, 1787, congress passed an ordinance for the government of the territory of the United States "northwest of the river Ohio." That ordinance provided, among other things that "no tax shall be imposed on lands the property of the United States," and that "the navigable

waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor." 1 Stat. 51, note. Virginia, by an act passed in 1788, and which referred to the above ordinance, declared that "the afore-recited article of compact between the original states and the people and states in the territory northwest of the Ohio river, be and the same is hereby ratified and confirmed, anything to the contrary in the deed of cession of the said territory by this commonwealth to the United States notwithstanding." 12 Hen. St. p. 780. On the 18th day of December, 1789, the general assembly of Virginia passed the act entitled "An act concerning the erection of the district of Kentucky into an independent state." That act provided for a convention in Kentucky to consider and determine whether that district should be formed into an independent state. Its eleventh, fourteenth, fifteenth, and eighteenth sections were in these words: "Sec. 11. That the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States; and the respective jurisdictions of this commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river." "Sec. 14. That if the said convention shall approve of the erection of the said district into an independent state on the foregoing terms and conditions, they shall and may proceed to fix a day posterior to the first day of November, one thousand seven hundred and ninety-one, on which the authority of this commonwealth, and of its laws, under the exceptions aforesaid, shall cease and determine forever over the proposed state, and the said articles become a solemn compact, mutually binding on the parties, and un-

alterable by either without the consent of the other. Sec. 15. Provided, however, that, prior to the first day of November, one thousand seven hundred and ninety-one, the general government of the United States shall assent to the erection of the said district into an independent state, shall release this commonwealth from all its federal obligations arising from the said district as being part thereof, and shall agree that the proposed state shall immediately after the day to be fixed as aforesaid, posterior to the first day of November, one thousand seven hundred and ninety-one, or at some convenient time future thereto, be admitted into the Federal Union." "Sec. 18. This act shall be transmitted by the executive to the representatives of this commonwealth in congress, who are hereby instructed to use their endeavors to obtain from congress a speedy act to the effect above specified." 13 Hen. St. p. 17. This was followed by an act of congress approved February 4, 1791, which referred to the above Virginia act of December 18, 1789, and expressed the consent of congress that the said district of Kentucky, "within the jurisdiction of the commonwealth of Virginia, and according to its actual boundaries on the 18th day of December, 1789," should on the first day of June, 1792, be formed into a new state, separate from, and independent of, the commonwealth of Virginia. 1 Stat. 189, c. 4.

Early in the history of Kentucky some doubts were expressed as to the location of the western and northwestern boundaries of that commonwealth, and to quiet those doubts its legislature passed the following act, which was approved January 27, 1810: "Whereas doubts are suggested whether the counties calling for the river Ohio as the boundary line extend to the state line on the northwest side of said river, or whether the margin of the southeast side is the limit of the counties; to explain which be it enacted by the general assembly, that each county of this commonwealth, calling for the river Ohio as the boundary line, shall be considered as bounded in that particular by the state line on the northwest side of said river, and the bed of the river and the islands

therefore shall be within the respective counties holding the mainland opposite thereto, within this state, and the several county tribunals shall hold jurisdiction accordingly." Sess. Laws Ky. 1810, p. 100.

Next in order of time, and as determining the boundary line of Kentucky, is the judgment of this court in Handly's Lessee *v.* Anthony (1820) 5 Wheat. 374, 379, 380, which case involved the question of the western and northwestern boundaries of that commonwealth. This court adjudged, upon a review of the legislative acts and public documents bearing upon the question,—CHIEF JUSTICE MARSHALL delivering its opinion,—that although a certain peninsula or island on the western or northwestern bank of the Ohio, separated from the mainland by only a narrow channel or bayou, which was not filled with water except when the river rose above its banks, was not within Kentucky, as originally established, the boundary of that commonwealth did extend to low-water mark on the western and northwestern banks of the Ohio. "When a great river," said the chief justice, "is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state [Virginia] is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created state extends to the river only. The river, however, is its boundary." "Whenever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark."

The question of boundary was again before this court in Indiana *v.* Kentucky, 136 U. S. 479, 505, 519, 10 Sup. Ct. 1052. That was a controversy between Kentucky and Indiana, as to the boundary lines of the two states at a particular point on the Ohio river. MR. JUSTICE FIELD, de-

livering the unanimous judgment of the court, after referring to all the documentary evidence relating to the question, and to the decision in Handly's Lessee *v.* Anthony, above cited, said: "As thus seen, the territory ceded by the state of Virginia to the United States, out of which the state of Indiana was formed, lay northwest of the Ohio river. The first inquiry, therefore, is as to what line on the river must be deemed the southern boundary of the territory ceded, or, in other words, how far did the jurisdiction of Kentucky extend on the other side of the river." Referring to the channel of the Ohio river as it was when Kentucky was admitted into the Union, this court stated its conclusion to be that "the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel."

The same view of the question of boundary was taken by the court of appeals of Kentucky in Fleming *v.* Kenney, 4 J. J. Marsh. 155, 158; Church *v.* Chambers, 3 Dana, 274, 278; McFarland *v.* McKnight, 6 B. Mon. 500, 510; and McFall *v.* Com., 2 Metc. (Ky.) 394, 396; and by the general court of Virginia in Com. *v.* Garner, 3 Grat. 655, 667.

State Boundaries.

Upon this question of boundary nothing can be added to what was said in the cases cited, and it must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio river.

Such being the case, it necessarily follows that the jurisdiction of that commonwealth, for all the purposes for which any state possesses jurisdiction within its territorial limits, is co-extensive with its established boundaries,—subject, of course, to the fundamental condition that its jurisdiction must not be exerted so as to intrench upon the authority of the national government, or to impair rights secured or protected by the national constitution.

3. But the plaintiffs in error insist that, although the jurisdiction of Kentucky may extend to low-water mark on the opposite shore of the Ohio river, the city of Henderson

cannot assess for taxation any part of the property of the bridge company between low-water mark on the Kentucky shore and low-water mark on the Indiana shore without violating the constitution of the United States in particulars to be adverted to presently.

In considering this objection so far as it is rested on federal grounds, we shall assume that the action of the city of Henderson was authorized by the terms of its charter, and was in no respect forbidden by any principle of local law. Upon these points we accept the decision of the highest court of Kentucky as conclusive. We accept, also, as binding upon this court, the declaration of the state court that Kentucky intended by its legislation to confer upon the city of Henderson a power of taxation for local purposes co-extensive with its statutory boundary. But we may add, as pertinent in the consideration of the federal questions presented, that if the commonwealth of Kentucky could tax for state purposes the bridge property, so far as it was between low-water mark on the Kentucky shore and low-water mark on the Indiana shore, it could confer upon one of its municipal corporations the power to tax the same property for local purposes. So that a judgment declaring the taxation of such property by the city of Henderson for local purposes, under the authority of the state, to be forbidden by the constitution of the United States, would, in effect, declare that like taxation by the state for state purposes would be forbidden by that instrument.

Taxation—Municipal Corporations.

It is said that the bridge property outside of low-water mark on the Kentucky shore is so far beyond the reach of municipal protection by the authorities of the city of Henderson that it cannot be said to receive any benefits whatever from the municipal government, and that to impose taxes for the benefit of the city upon such property is a taking of private property for public use without just compensation, and therefore inconsistent with the due process of law ordained by the fourteenth amendment of the constitution of the United States.

Same—Same—Bridge Property beyond Low-Water Mark—Constitutional Law.

Chicago, B. & Q. R. Co. *v.* City of Chicago, 166 U. S. 226, 241, 17 Sup. Ct. 581. It is conceivable that taxation may be of such a nature, and so burdensome, as properly to be characterized a taking of private property for public use without just compensation.

But in order to bring taxation imposed by a state, or under its authority, within the scope of the fourteenth amendment of the national constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation, by its necessary operation, is really spoliation under the guise of exerting the power to tax. As an act of congress should not be declared unconstitutional, unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the national constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments. In the case before us the state court rejected the idea that the bridge property in question was entirely beyond municipal protection, and could not receive any of the benefits derived from the municipal government of the city of Henderson. We cannot adjudge that view to be so clearly untenable as to entitle the defendants to invoke the principle that private property cannot be taken for public use without just compensation.

On the contrary, the property which it is contended was illegally taxed is all within the territorial limits of Kentucky, within the statutory boundary of the city of Henderson, and within reach of the police protection afforded by that city for the benefit and safety of all persons and property within its limits,—not, perhaps, as much or as distinctly so as that part of the bridge on the Kentucky bank south of low-water mark on that shore; but this difference does not constitute a reason why the city may not regard the bridge and its appurtenances within its statutory boundaries as an entirety

for purposes of taxation, nor afford any proper ground for holding that the constitutional right to compensation for private property taken for public use has been violated. The court of appeals of Kentucky, in its opinion in this case, said: "Applying the just and equitable rule of making burdens and benefits of government reciprocal, we think the whole bridge structure within the corporate limits of the city of Henderson is liable for municipal taxes; for neither the benefits to the bridge company are lessened, nor its corresponding duty to bear its full share of the burden is impaired or affected, by the fact that a portion of the bridge is over water." We are unwilling to hold that the state court, in so adjudging, has prescribed any rule of taxation inconsistent with the supreme law of the land.

In determining a question of this character, the power to tax existing, a judicial tribunal should not enter into a minute calculation as to benefits and burdens, for the purpose of balancing the one against the other, and ascertaining to what extent the burdens imposed are out of proportion to the benefits received. Exact equality and absolute justice in taxation are recognized by all as unattainable under any system of government. The court of appeals of Kentucky, speaking by CHIEF JUSTICE MARSHALL, in Cheaney *v.* Hooser, 9 B. Mon. 330, 345, after observing that there must necessarily be vested in the legislature a wide range of discretion as to the particular subjects or species of property which should be the subject of general or local taxation, as well as to the extent of the territory within which a local tax shall operate, well said: "There must be a palpable and flagrant departure from equality in the burden, as imposed upon the persons or property bound to contribute, or it must be palpable that persons or their property are subjected to a local burden for the benefit of others, or for purposes in which they have no interest, and to which they are, therefore, not justly bound to contribute. The case must be one in which the operation of the power will be at first blush pronounced to be the taking of private property without

compensation, and in which it is apparent that the burden is imposed without any view to the interest of the individual in the objects to be accomplished by it."

Proceeding upon the ground, distinctly affirmed by the highest court of Kentucky, that the city of Henderson was authorized by the state to exert its power of taxation as to all property within its statutory boundary, and assuming it to be conclusively established by judicial decisions that the boundary and jurisdiction of Kentucky extends to low-water mark on the Indiana side of the Ohio river, we adjudge that the taxation by the city, as property, of the bridge and its appurtenances within the fixed boundary of the city, between low-water mark on the two sides of the Ohio river, was not a taking of private property for public use without just compensation, in violation of the constitution of the United States.

Same—Same—Same—Same.

4. Another contention of the defendants is that the acceptance by the bridge company of its charter, and the construction of the bridge under it, created a contract between that company and the state, whereby the bridge structure north of low-water mark on the Kentucky shore of the river was exempted from taxation for any local purpose, and that the tax ordinances of the city of Henderson, on which the taxation in question is based, impair the obligation of that contract, and for that reason are repugnant to the constitution of the United States.

Same—Same—Same—Same—Construction of Charter.

Did the bridge company acquire by contract an exemption from local taxation in respect of its bridge situated between low-water mark on the two shores of the Ohio river? We think not. The charter of the city of Henderson shows that its boundary extended to low-water mark on the Indiana shore of that river, and that the common council was invested with authority to levy and collect taxes at a prescribed rate upon all property "within the limits of the city" which was taxable by law for state purposes, with certain specified exceptions, that have no relation to the particular question just stated.

So that the grant made in 1882 to the bridge company was made subject to the taxing power thus possessed by the municipal authorities of the city of Henderson. And that there was no purpose on the part of the city to waive any right it possessed to tax property for municipal purposes is made clear by the express stipulation that the grant to the bridge company should not be construed "as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or any building erected by said bridge company within the corporate limits of said city, the bridge itself, and all appurtenances thereto within the limits of said city." This stipulation, properly interpreted, not only saved any right the city then had to impose taxes, but any right that might subsequently be lawfully conferred upon it. An exemption from taxation cannot arise from mere implication, but only from words clearly and unmistakably granting such an immunity.

Exemption from Taxation—Construction of Municipal Grant.

But let it be assumed, for the purposes of the present case, that the stipulation only embraced such right of taxation as the city had at the time it granted authority to construct the bridge within its limits. In that view, the defendants insist that interpreting the charter of the city and the grant to the bridge company in the light of the law of Kentucky, as established at the date of that grant by repeated decisions of its highest court, property such as this bridge, situated between low-water mark on the two shores of the Ohio river, although within the statutory boundary of the city, was not within the limits of the city for purposes of municipal taxation; for, it is contended, the bridge structure so taxed did not and could not receive from the municipal government any benefits, actual or presumed. The cases in the court of appeals of Kentucky, decided before the bridge company accepted its charter, upon which defendants rely in support of this contention, are Cheaney *v.* Hooser (1848) 9 B. Mon. 330; Covington *v.* Southgate (1854) 15 B. Mon. 498; Marshall *v.* Donovan (1874) 10 Bush, 681, 692; and Courtney *v.*

Louisville (1876) 12 Bush, 419. These cases related to the taxation by municipal corporations of lands which, it was alleged, were so situated as not to receive any benefit whatever from the government of such corporations. The general principle to be deduced from them is that the taxation of lands for local purposes which do not receive any benefits, actual or presumed, from the municipal government imposing the taxation, is a taking of private property for public use without compensation, and therefore in violation of the constitutional provision on that subject. So that if the charter of the bridge company was accepted with reference to the law of Kentucky as it was then judicially declared by its highest court, as may well be assumed, the utmost that can be asserted is that the company had a contract with the state which prohibited it, or any municipal corporation acting under its authority, from subjecting such of the bridge property to local taxation as could not receive any benefit, actual or presumed, from the government of that corporation.

In those cases the court wisely refrained from laying down any general rule that would control every controversy that might arise touching the application of the constitutional provision prohibiting—as did the constitution of Kentucky as well as that of the United States—the taking of private property for public use without just compensation. So far as those adjudications are concerned, it is competent for the court to inquire in every case, as it arises, whether particular property taxed for local purposes is so situated that it cannot receive any benefit, actual or presumed, from the government of the municipal corporation imposing such taxation. The argument of the learned counsel assumes it to be incontrovertible that the bridge property here taxed cannot receive any such benefit from the government of the city of Henderson. As already indicated, this court does not accept that view, and is of opinion that the bridge property within the statutory limits of that city, and looked at in its entirety, may be regarded as so situated with reference to the city that it enjoys, and must continue to enjoy as long as the bridge

exists, such benefits from the government of the city that, consistently with the constitution of the United States, and consistently with the rule heretofore adverted to for determining the validity of legislative enactments, it may be subjected to municipal taxes under any system established by the state for the assessment of property for taxation. In this view, there is no ground upon which to base the contention that the ordinance of the city imposing the taxation in question impairs the obligation of any contract between the bridge company and the state arising from the acceptance by that company of its charter, and the construction of the bridge under it.

What has been said disposes of the contention that to sustain the validity of the ordinances under which the bridge was taxed would impair the obligation of the contract between the bridge company and the Louisville & Nashville Railroad Company. It is scarcely necessary to observe that no contract between the bridge company and the railroad company could stand in the way of the city exerting, as between it and the bridge company, any power of taxation it legally possessed. If the taxation in question did not impair the obligation of any contract between the city and the bridge company,—and we have held that it did not,—it results that the railroad company cannot complain of such taxation. The agreement between the bridge company and the railroad company was necessarily subject to the exercise by the city of any authority it had, or might have, touching the taxation of the bridge for local purposes.

Contracts—Rights of Third Party.

5. The assignments of error embrace the contention that the judgment below denies to the bridge company the equal protection of the laws, "in that its property has been subjected to taxation from which all other land not divided into lots has been exempted, although the only reasons for exemption apply with much greater force to the property of the plaintiff in error than to the property which enjoys the exemption."

Municipal Taxation—Construction of Charter.

This contention is based upon the proviso in the city's charter declaring that "no land embraced within the city limits, and outside of ten-acre lots as originally laid off, shall be assessed and taxed by the city council, unless the same is divided or laid out into lots of five acres or less; and unless all of same is actually used and devoted to farming purposes." Acts Ky. 1887-88, vol. 2, p. 991.

We are of opinion that this proviso has no reference to bridges, their approaches, piers, etc., but refers only to lands capable of being cultivated, or used and divided into lots upon which buildings may be erected, or over which streets or other highways may be constructed. This is the better interpretation of both the old and the new charters of the city. Besides, the construction placed by the state court upon the charter of the city in respect of its power to tax the bridge property necessarily leads to the conclusion that the provision forbidding the taxation of lands not divided into lots of five acres or less does not apply to a bridge erected over the Ohio river within the city's limits. In this view, there is no basis for the suggestion of a denial of the equal protection of the laws, particularly as it is not contended that the city applies to the assessment of the bridge and its approaches for taxation any rule that is not applied to all property within its limits. As in the case of the property of others, the bridge and its approaches are required to be taxed upon their value.

6. Another contention of the plaintiffs in error is that the assertion of the right of the commonwealth of Kentucky, or of any municipal corporation acting under its authority, to tax bridge structures permanently located, with the consent of congress, in or over the bed of the Ohio river, is the assertion of authority over that stream inconsistent with the congressional and legislative compact concerning its use, and inconsistent with the concurrent jurisdiction over the river of the states on either side of it. Indeed, the defendants insist that, if the power to tax the bridge structure north of low-water mark on the Kentucky side and south of low-water mark on the Indiana side of the

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Ohio river exists at all, it rests in congress, and could not be exercised even by the concurrent action of two states, much less by the independent action of one.

The present case does not require any decision by this court as to the extent and character of the jurisdiction which may be exercised over the Ohio river by the states whose boundaries come to low-water mark on its shore opposite to Kentucky. The only question for determination is whether the taxation, under the authority of Kentucky, of this bridge within its jurisdiction, involves any encroachment upon federal authority, or any infringement of rights secured to the defendants by the constitution of the United States.

Touching the first branch of this question, it is to be observed that Kentucky was admitted into the Union with its "actual boundaries" as they existed on the 18th day of December, 1789; that is, with its northern and western boundary extending to low-water mark on the opposite side of the Ohio river. That state came into the Union equal in all respects with the states that had accepted the national constitution, and with every power that belonged to any existing state; and therefore its power of taxation was in no respect limited or restrained, except as its exercise was expressly or impliedly limited or restrained by that instrument. But what clause of that instrument declares that a state may not tax for state purposes any property within its territorial limits which is owned and operated by one of its own private corporations? In McCulloch *v.* Maryland, 4 Wheat. 316, 429, it was said by the chief justice to be obvious that the power of taxation was an incident of sovereignty, was co-extensive with that to which it was an incident, and that "all subjects over which the sovereign power of a state extends are objects of taxation." The subject of taxation in this case is a bridge structure within the territorial limits of Kentucky. It is therefore property over which the state may exert its authority, provided it does not encroach upon federal power, or

Taxation—State Powers.

intrench upon rights secured by the constitution of the United States. It is none the less property, although the state does not own the soil in the bed of the river upon which the piers of the bridge rest. Whatever jurisdiction the state of Indiana may properly exercise over the Ohio river, it cannot tax this bridge structure south of low-water mark on that river, for the obvious reason that it is beyond the limits of that state, and permanently within the limits of Kentucky.

Nor do we perceive that the power of Kentucky to tax this bridge structure as property is any the less by reason of the fact that it was erected in and over the Ohio river under the authority or with the consent of congress. The taxation of the bridge by Kentucky is in no proper sense inconsistent with the power of congress to regulate the use of the river as one of the navigable waters of the United States. This taxation does not interfere in any degree with the free use of the river by the people of all the states, nor with any jurisdiction that the state of Indiana may properly exercise over that stream.

Same—Same—Instruments of Interstate Commerce.

Nor does the fact that the bridge between low-water mark on either side of the river is used by the corporation controlling it for purposes of interstate commerce exempt it from taxation by the state within whose limits it is permanently located. The state cannot by its laws impose direct burdens upon the conduct of interstate commerce carried on over the bridge. But, as the decisions of this court show, it may subject to taxation property permanently located within its territorial limits, and employed in such commerce by individuals and by private corporations. In Covington & C. Bridge Co. *v.* Kentucky, 154 U. S. 204, 212, 14 Sup. Ct. 1087, 1090, it was said: "As matter of fact, the building of bridges over waters dividing two states is now usually done by congressional sanction. Under this power the states may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax is not laid upon the commerce

itself." See, also, Henderson Bridge Co. *v.* Henderson City, 141 U. S. 679, 689, 12 Sup. Ct. 114; Pittsburgh, C., C. & St. L. Ry. Co. *v.* Board of Public Works of West Virginia, 172 U. S. 32, 19 Sup. Ct. 90. In Thomson *v.* Railroad Co., 9 Wall. 579, the question was as to the liabilities and rights of a railroad company in respect to taxation under state legislation. It was contended in that case that the road, having been constructed under the direction and authority of congress for the purposes and uses of the United States, and being a part of a system of roads thus constructed, was exempt from taxation under state authority; that the road was an instrument of the general government, and as such not subject to taxation by the state. That contention was overruled, this court saying: "We are not aware of any case in which the real estate or other property of a corporation not organized under an act of congress has been held to be exempt, in the absence of express legislation to that effect, from just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government." "There is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means. Taxation of the property of the agent is not always or generally taxation of the means." In the same case the court said that "no one questions that the power to tax all property, business, and persons within their respective limits is original in the states, and has never been surrendered," although that power cannot be so used "as to defeat or hinder the operations of the national government." The same principles have been maintained in other cases in this court. If a state may tax the property of one of its corporations engaged in the service of the United States, such property being within its limits, there is no sound reason why the bridge property in question, although erected, with the consent of congress, over one of the navigable

waters of the United States, should be withdrawn from the taxing power of the state which created the corporation owning it, and within whose limits it is permanently located.

The judgment of the court of appeals is affirmed.

GUTHRIE NAT. BANK

v.

CITY OF GUTHRIE.

(*Supreme Court of the United States, April 3, 1899.*)

Jurisdiction—Amount Involved.—Where a claim under a statute bears interest from the date of its allowance, and the amount of the claim with interest, when a motion to dismiss the proceedings to recover the claim in the district court of the county was made, exceeded $5,000, the amount involved is sufficient to give the supreme court of the United States jurisdiction, although the claim alone is less than $5,000.

Territories—Legislative Powers.—Whether a general law can be made applicable to the subject matter in regard to which a special law is enacted by a territorial legislature is a matter which rests in the judgment of the territorial legislature itself.

Validity of Territorial Statute.—A statute merely creating a special tribunal for hearing and deciding upon claims against a municipal corporation which have no legal obligation, and which, therefore, could not be enforced in a court, but which the territorial legislature thinks have sufficient equity to make it proper to provide for their investigation, and for the payment of such as are decided to be proper, by taxation upon property situated in the city, is not affected by a federal act prohibiting the passage of special laws to regulate the practice in courts of justice.

Claims against "Provisional Municipal Governments"—Subsequent Incorporation—Legislative Powers.—Where a territory is opened, and, before congress has established any government therefor, a "provisional municipal government" is formed therein by the general consent of the residents, which incurs indebtedness through its *de facto* officers, after the territorial government is established, and the "provisional municipal government" is legally incorporated,

the territorial legislature may pass an act rendering the municipality liable for such indebtedness, and create a commission to investigate and pass upon claims against the "provisional municipal government," the proceedings of which are to be reviewed by the district court of the county.

Trial by Jury—Constitutional Law.—Such an act is not repugnant to the seventh amendment of the constitution of the United States, although it makes no provision for a trial by jury where it is necessary to ascertain facts.

Judicial Investigation—Construction of Statute.—Where such an act directs that the commission's report shall be made "for the approval or disapproval of the district court," it follows that such court is given power to investigate for itself the facts upon which the claims reported are founded.

Courts—Powers.—Although such an act makes no provision for notice to the parties interested as to the time or manner in which the district court of the county will proceed to investigate the character of the claims, the court having the duty to investigate would have power to regulate the time of the hearing, and provide for notice by its rules.

Jurisdiction.—Where the district court of the county has refused to exercise any jurisdiction under such an act because it held the act repugnant to the federal constitution, and a writ of error has been properly sued out from the territorial supreme court, a writ of error from the supreme court of the United States to the latter court may properly issue.

ERROR by plaintiff to, and appeal from, the Supreme Court of the Territory of Oklahoma. *Affirmed.*

Case Stated.

The president of the United States, by proclamation dated March 23, 1889 (26 Stat. 1544), declared that the territory of Oklahoma would be open for settlement on April 22, 1889, subject to the restrictions of the act approved March 2, 1889 (25 Stat. 980, 1004, c. 412). By that act the lands were to be disposed of to actual settlers under the homestead laws only, and, until the lands were open for settlement under the proclamation of the president, no person was permitted to enter upon or occupy the same.

By the act approved May 2, 1890 (26 Stat. 81, c. 182), congress provided a temporary government for the territory;

and by the act approved May 14, 1890 (26 Stat. 109, c. 207), provision was made for town-site entries.

From the opening of the territory, under the proclamation of the president, down to the passage of the act of May 2, 1890, congress failed to establish any government for it. During that period settlers had come into the territory, and a number of town sites had been located and settled upon by them. Many persons located and took up their residence upon the land contained in the present boundaries of the city of Guthrie. The lands were surveyed into streets, alleys, squares, blocks, and lots, and what were known as "provisional municipal governments" were formed. By the general consent of these residents, four distinct provisional municipal corporations or villages, denominated "Guthrie," "East Guthrie," "Capitol Hill," and "West Guthrie," comprising some 320 acres each, were created. They were all without any law governing them, although officers were selected by the people occupying the lands, and a form of government was carried on by a kind of mutual understanding. The persons chosen as officers incurred indebtedness in administering the affairs of the municipalities, but there was no authority to raise the necessary revenues, by taxation or otherwise, to pay the same. These officers exercised, in fact, the powers usually delegated to municipal corporations. Public improvements, such as grading streets, constructing bridges, and erecting buildings, were made, laws and ordinances were adopted, and offenders were punished. Schools were maintained, and the right of possession of the various claimants to town lots within their respective boundaries was regulated, and certificates were issued by the local tribunals constituted by the municipal authorities for determining the rights of settlers and occupants of the various lots within the limits of the municipal governments; and the certificates thus issued were by the second section of the town-site act, above mentioned (26 Stat. 109), to be taken as evidence of the occupancy of the holder thereof of the lot or lots therein described, except that, where there was an

adverse claim to the property, the certificate was to be only *prima facie* evidence of the claim or occupancy of the holder.

The claims mentioned in the act of the territorial legislature hereafter spoken of arose out of these circumstances, and represented the expenditures of the provisional governments for some or all of the objects above enumerated.

In December, 1890, a code of laws for the permanent government of the territory was enacted by the territorial legislature, and these provisional village governments, lying adjacent to one another, were incorporated under that authority into the regularly organized village of Guthrie; and on April 7, 1893, the city of Guthrie became the successor of the village of that name.

On December 25, 1890, the territorial legislature passed an act (chapter 14 of the laws of that year) for the purpose of providing a method by which to raise the necessary funds to pay the indebtedness incurred by the provisional governments of the four villages above named. The act is set forth in the margin.[1]

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[1] Chapter 14. City Indebtedness.

An act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, now consolidated into the village of Guthrie.

Article 1. Guthrie, East Guthrie, West Guthrie and Capitol Hill.

Section 1. That the district judge of Logan county is hereby empowered to appoint three disinterested persons to act as a commission or referees to inquire into and pass upon all claims and demands of every character heretofore issued by the city governments mentioned in the caption of this act, for all purposes.

Sec. 2. That the owners and holders of any kind of scrip, warrants or other evidence of indebtedness, heretofore issued by the city governments of Guthrie, East Guthrie, West Guthrie and Capitol Hill, shall present their claims to the commissioners or referees, to be appointed by the district judge, under oath, stating that the same is a *bona fide* claim, that they performed the labor or advanced the

Pursuant to the provisions of that act the district judge duly appointed the commission, which proceeded to hear the cases; and on September 1, 1891, it filed in the district court of Logan county its final report. That report contained, among other things, a reference to the various claims which were therein said to be owned by the Guthrie National Bank; and it showed the allowance of such claims, separately and in detail, and that they were all based upon warrants which had been issued by the provisional governments. The report also showed that the city attorney of the city of Guthrie appeared at the hearing and allowance of the claims, and defended for the city. The amount allowed against the city in favor of the bank was $4,315.22. Other claims in favor of other parties were allowed, and many were disallowed, by the commission. On the coming in of this report the case was docketed as a pending case in the district court, and was continued from time to time until March 17, 1893, when the bank made a motion to approve the findings of the commission as regards the claims held by it, which motion was not then decided. On April 7, 1893, the city filed

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money or furnished the materials or purchased same for a valuable consideration, and that they believe the city, issuing the same, did so for necessary expenses incurred in running the city government, and said master shall hear further evidence if he deem necessary before allowing the same.

Sec. 3. The commission or referees shall keep a record of all claims filed with them for allowance and keep their office open during the hours of nine o'clock in the morning and four o'clock p. m., and shall be allowed sixty days to hear and determine all claims, or longer if the district judge so orders. Said commission or referees shall immediately after this appointment extend ten days' notice in some newspaper published in the village of Guthrie, notifying all parties holding or owning any claims mentioned in this act to present the same to them for allowance; and all persons who fail to present their claims within thirty days from date of publication mentioned in this section shall be forever precluded from so doing hereafter.

Sec. 4. That after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they

exceptions to the report of the commission. Nothing further was done until March 28, 1896, at which time the city attorney filed a motion in the district court to dismiss the proceedings by the bank, and all other proceedings based upon the act of the territorial legislature creating the commission, for the reason, as stated, that the act and all proceedings under it were void. On April 2, 1896, the matter came on for hearing upon the motion of the bank to confirm the report of the commission, and the motion of the city to dismiss the proceedings; and on the last-named day the court sustained the motion of the city, and dismissed the proceedings, upon the ground that the act under which the commission was appointed was wholly void. This decision of the court was excepted to by the bank, and therenpon it prosecuted a writ of error from the supreme court of the territory to reverse such decision. On June 11, 1897, that court affirmed the decision of the district court, and rendered judgment against the bank for costs. —— Pac. ——. To reverse this judgment an appeal has been taken to, and a writ of error sued out from, this court.

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shall make a report to the district court of same showing the names and amounts allowed by them and also all claims and the names of persons and amounts disallowed by them, for approval or disapproval of the district judge. And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the village to the holders and owners, payable in installments each of the amounts to be in one, two, three, four and five years, to bear interest at the rate of six per cent. per annum from the date of the allowance by the commission or referees, and said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision heretofore constituting Guthrie, East Guthrie, West Guthrie and Capitol Hill according to the amount of indebtedness created by the city councils, the mayors and school boards, heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them.

Guthrie Nat. Bank *v.* City of Guthrie

Henry E. Asp and *John W. Shartel*, for appellant and plaintiff in error.

John K. Richards, *W. J. Hughes*, and *John L. Lott*, for appellee and defendant in error.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

A motion is made in this case to dismiss the appeal and writ of error on the ground that the sum involved is not sufficient to give jurisdiction to this court. 26 Stat. 81, § 9. It is claimed that the amount is less than $5,000, and that this fact appears from the report of the commission, which allowed but $4,315.22 as the amount due from the city to the bank.

Jurisdiction—Amount Involved.

Section 4 of the act of the territorial legislature under which the commission acted provides that claims which are allowed and approved by the district judge are to be certified to the mayor and council of the village of Guthrie, who are directed to issue warrants upon the village for the amounts, which bear interest at the rate of 6 per cent. from the date of the allowance by the commission; and a tax is to be levied as therein provided for the payment of the warrants.

On March 28, 1896, when the city of Guthrie filed its motion in the district court to dismiss the proceeding by the bank, over four years and six months' interest had accrued upon the claim reported by the commission; and as, by the terms of the act, interest was to be allowed from the filing of that report up to the time of the issuing of the warrant, which could not issue until after the report had been approved by the district court, it is plain that more interest had then accrued than was necessary to bring the amount then in issue beyond the sum of $5,000. It is proper to compute interest as part of the claim. Woodward *v.* Jewell, 140 U. S. 247, 11 Sup. Ct. 784. We think this is an answer to the motion to dismiss.

Other objections are made to the act by the representatives of the city, which will be noticed.

It is claimed that it violates the act of congress, approved July 30, 1886 (24 Stat. 170, c. 818), prohibiting the passage of local or special laws in the territories. That act, among other things, provides that, where a general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the territorial legislature thereof; and it also provides that the territorial legislature shall not pass local or special laws in any of the cases therein enumerated, among which is a law to regulate the practice in courts of justice. Both of these provisions are said to have been violated in the passage of the act in question.

Whether a general law can be made applicable to the subject-matter in regard to which a special law is enacted by a territorial legislature is a matter which, we think, rests in the judgment of the legislature itself. State *v.* Hitchcock, 1 Kan. 184. That body is specially prohibited from passing any local or special law in regard to certain subjects enumerated in the act. Outside and beyond that limitation is the provision above mentioned, and whether or not a general law can be made applicable to the subject is a matter which is confined to the judgment of the legislature.

Territories—Legislative Powers.

Neither does the act in this case regulate the practice in courts of justice. The prohibition of the statute of congress relates to the passing of a law by the territorial legislature, local or special in its nature, which does in effect regulate the mode of procedure in a court of justice in some particular locality or in some special case; thus altering in such locality or for such case the ordinary course of practice in the courts. The statute here in question is of an entirely different nature. It creates a special tribunal for hearing and deciding upon claims against a municipal corporation which have no legal obligation, and which therefore could not be enforced in a court, but which the legislature thinks have sufficient equity, and are based upon a sufficiently strong moral obligation, to make it proper for it to provide for their investigation, and

Validity of Territorial Statute.

for the payment of such as are decided to be proper, by taxation upon the property situated in the city. Such an act does not in any way regulate the practice in courts of justice.

The important question in this case is whether the territorial legislature, by virtue of the grant to it of legislative powers, had authority to create this commission, and to provide for the payment of claims of the nature mentioned in the act.

By section 6 of the above-mentioned act of congress of May 2, 1890 (26 Stat. 81, c. 182), the legislative power of the territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. Some other limitations are mentioned, not material to be here considered. The same power is also granted to all the territories by section 1851, Rev. St. U. S.

This territorial act was passed by the legislature with reference to the circumstances set forth in the statement of facts.

It was said by the supreme court of Oklahoma in City of Guthrie *v.* Territory, 1 Okl. 188, 31 Pac. 190, that: "These provisional governments grew out of a necessity made by the absence of legal authority. They were aggregations of people associated together for the purpose of mutual benefit and protection. Without any statute law, they became a law unto themselves, and adopted the forms of law and government common among civilized people, and enforced their authority by the power of public sentiment. They had no legal existence. They were nonentities. They could not bind themselves by contracts, or bind any one else."

The services performed for, and the materials furnished, these provisional governments, under the circumstances stated, would certainly be regarded as proper and as beneficial—probably as absolutely necessary—for the well-being of the people living there. The villages which were subsequently incorporated under the law of the territory succeeded to and enjoyed these benefits, and passed them on to their successor, the city of Guthrie, the present defendant in error

and appellee. These facts give great force and strength to the moral consideration supporting claims of the nature here existing. Though they could not be enforced at law, the question is whether the territorial legislature was unequal to the task of providing for their payment by the city, which has received the benefit, as above described.

This territorial act shows that only claims of a municipal character and of a *bona fide* nature could be allowed. It is also plain that the use of the words "district judge" therein does not mean to distinguish between the judge and the court. There being but one judge of that court, the words are seemingly used interchangeably with "district court," and to mean the same as the latter expression.

We regard the power of the territorial legislature to pass this act as indisputable. It comes within the grant to that legislature contained in the act of congress and in the Revised Statutes above cited.

In U. S. *v.* Realty Co., 163 U. S. 427, 439, 16 Sup. Ct. 1120, the power of congress to recognize a moral obligation on the part of the nation, and to pay claims which, while they were not of a legal character, were nevertheless meritorious and equitable in their nature, was affirmed. The territorial legislature at least had the same authority as that possessed by congress to recognize claims of the nature described. It is a legislative power, and it was granted to the territorial legislature by the acts already referred to. A city is a municipal corporation and a political subdivision of the state, and, what the state could do itself, it has the power to direct its agent, the municipality, to do.

Claims against "Provisional Municipal Governments"—Subsequent Incorporation—Legislative Powers.

In New Orleans *v.* Clark, 95 U. S. 644, MR. JUSTICE FIELD, in delivering the opinion of the court, and speaking of municipal corporations, at page 653, said: "The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized, and their payment secured." And on

page 654: "A city is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such a corporation to assume and pay a particular claim, not legally binding, for want of some formality in its creation, but for which the corporation has received an equivalent,"—citing People *v.* Burr, 13 Cal. 343; Town of Guilford *v.* Board Sup'rs Chenango Co. 143. In the latter case the legislature passed an act directing commissioners to determine and award the amount paid and expended by certain highway commissioners, and directing the board of supervisors of the county to assess the amount thus awarded upon the taxable property of the town, and to cause it to be paid in satisfaction of the claim. This was held to be a valid act, although the claim had been rejected in a suit brought to obtain its payment, and a previous legislature had passed an act directing the claim to be submitted to the electors at a town meeting, and declaring their decision should be final and conclusive, and upon such submission the claim had been rejected. It was said that the legislature of the state had power to levy a tax upon the taxable property of the town, and appropriate the same to the payment of the claim made by an individual against the town, even though the claim, to satisfy which the tax was levied, was not recoverable by action against the town; and it was held that the state could recognize claims founded in equity and justice, in the larger sense of these terms, or in gratitude or charity.,

It is not necessary to say in this case that the legislature had the power to donate the funds of the municipality for purposes of charity alone. The facts show plain moral grounds for the

act,— a consideration existing in the benefits received and enjoyed by the city or by its predecessors, from whom it took such benefits. The legislature might have decided the facts for itself, but, instead of that, it appointed this tribunal.

In Read *v.* City of Plattsmouth, 107 U. S. 568, 2 Sup. Ct. 208, the words of MR. JUSTICE FIELD in New Orleans *v.* Clark, *supra*, were quoted with approval. In the exercise of this jurisdiction over municipal corporations by the state or by the territorial legislature, no constitutional principle is violated. It is a jurisdiction which has been customarily exercised ever since the foundation of the government, and is based upon the power of the state, as sovereign, to itself recognize, or to compel any of its political subdivisions to recognize, those obligations which, while not cognizable in any court of law, are yet based upon considerations so thoroughly equitable and moral as to deserve and compel legislative recognition.

There is no force to the objection that, in ascertaining the facts, provision must be made for a trial by jury, if demanded, or else that the seventh amendment to the constitution of the United States is violated, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

Trial by Jury—Constitutional Law.

This act does not infringe upon that amendment. The proceeding under it is not in the nature of a suit at common law, and the cases already cited show the power of the legislature to provide for payment by taxation of claims of the nature of those involved herein.

The cases of Bank *v.* Dudley's Lessee, 2 Pet. 492; Publishing Co. *v.* Fisher, 166 U. S. 464, 17 Sup. Ct. 618, and Salt Lake City *v.* Tucker, 166 U. S. 707, 17 Sup. Ct. 717, were cases of suits at common law; and Thompson *v.* Utah, 170 U. S. 343, 18 Sup. Ct. 620, was a criminal case. Those cases, therefore, do not apply here.

It is also stated that these claims were not incurred by officers of either a *de jure* or *de facto* government, and that,

hence, there was no power in the legislature to compel the city of Guthrie to pay claims which it never agreed to pay either as a corporation *de jure* or *de facto*. But the cases above cited were cases where there was no legal obligation to pay the claims, and the acts, in effect, compelled their payment. The city here was under a plain moral duty to provide payment for honest and proper claims of this nature, and it seems as if it ought to be entirely ready to pay them. If any claims were without merit or fraudulent, there was opportunity to show such fact before the commission, and also before the district court, upon the hearing provided for by the act. The defendants in error say that there is by the act no opportunity provided for any investigation of these claims by the district court after the commission has reported the claims to that court, because the act does not give the court power to make any investigation for itself. We do not see that this is material, even if true. We are of opinion, however, that the district court has such power. The statute provides, in section 4, that the commission shall make a report to the district court, showing the names of the claimants and the amounts allowed by the commission, and also all the claims, and the names of persons and amounts disallowed by them; and this report, the statute directs, shall be made "for the approval or disapproval of the district court." The report need contain nothing but what has just been stated, and it is obvious that on such a report alone the district court would be entirely without means of determining whether to approve or disapprove the decision of the commission in any particular claim. But as the report of the commission is to be made to the district court for its approval or disapproval, it follows, as of necessity, that the court has power to investigate for itself the facts upon which the claims were founded, in order that it may intelligently approve or disapprove of the decisions of the commission. It is not to be supposed that the provision in the act for making a report to the district court, and for its approval or disapproval, was

Judicial Investigation—Construction of Statute.

a purely formal matter, and that the court might arbitrarily, unreasonably, or improperly approve or disapprove any claim. If not, then the court must have power, in the necessary discharge of its duty to approve or disapprove, to ascertain the facts necessary to an intelligent discharge of that duty. These facts may be found by the court without a jury. As the statute does not provide for a report of the facts found by the commission upon which it based the allowance or disallowance of the claims, or any of them, the court must itself find them, in order to approve or disapprove.

Although the act makes no provision for notice to the parties interested as to the time or manner in which the district court will proceed to investigate the character of the claims, yet, in the absence of any such provision, the court having the duty to investigate would have power to regulate the time of the hearing, and provide for reasonable notice by its rules, so as to prevent surprise. This, in substance, was held in U. S. *v.* Ritchie, 17 How. 525, 533, where a similar lack of provision for notice in a certain section of the act was referred to, and the power of the court to make rules in regard to it was asserted. Courts—Powers.

Whether the act is to be construed as making the decision of the district court upon the merits of any claim final, it is not now necessary to decide. The district court has refused to exercise any jurisdiction under the act, because it decided the act was invalid. Upon such a judgment we think a writ of error was properly sued out from the territorial supreme court, under the ninth section of the act (26 Stat. 85), and under the same section a writ of error from this court to the latter court may properly issue. Jurisdiction.

The other questions set forth in the brief of counsel for the defendant in error, relating to parties and matters of procedure, we have examined, and regard them as without merit.

We are of opinion that the district court erred in dismissing these proceedings on the ground of the invalidity of the act under which they were taken, and that the supreme court of the territory erred in affirming that judgment of dismissal;

and we therefore reverse the judgment of the latter court, and remand the case, with directions to that court to reverse the judgment of the district court, with directions to the district court to proceed to a hearing of the claims upon their merits.

So ordered.

MR. JUSTICE HARLAN dissented.

RALSTON

v.

TOWN OF WESTON.

(*Supreme Court of Appeals of West Virginia, April 22, 1899.*)

Streets—Dedication—Estoppel.*—If an original owner of a tract of land lays the same off into town lots, with streets and alleys between, and has the same so platted, and sells the lots with reference to such streets and alleys as boundary lines of the same, and such plat is adopted by the corporate authorities of the town in which such lots are situated, a purchaser of one of such lots is estopped from denying the dedication of such streets to public use.

Municipal Corporations—Limitations.—The statute of limitations runs against the state and municipal corporations, as against individuals in all similar cases.

Same—Same.—The maxim, "*Nullum tempus occurrit regi*," applies to all the sovereign rights and property of the people of the state dedicated to public uses, and of which they cannot be deprived otherwise than according to their express will and appointment.

Public Easements in Highways—Whether Destructible.—The public easement in the public highways, including roads, streets, alleys, and other public thoroughfares, dedicated to the use of the general public by individuals, or under the right of eminent domain, is such property, and cannot be lost to the people by the negligence of public officials or the unlawful acts of individuals.

Same—Same.*—An individual cannot destroy such easement by setting up a claim by prescription, adverse possession under the statute of limitations, or equitable estoppel, as the people cannot be deprived of their sovereign rights in any of these ways.

*See note at end of case.

Ralston *v.* Town of Weston

Same—Same—Limitations.—The opinions of the judges of this court in the cases of City of Wheeling *v.* Campbell, 12 W. Va. 36, Forsyth *v.* City of Wheeling, 19 W. Va. 318, and Teass *v.* City of St. Albans, 17 S. E. 400, 38 W. Va. 1, in so far as they hold that the public easement in the public highways of this state is subject to the bar of the statute of limitations, are disapproved.

Eminent Domain—Right to Compensation.—It is the expressed will of the people of this state that private property shall not be taken or damaged for public use by governmental officers or agencies, without just compensation.

(Syllabus by the Court.)

APPEAL by defendant from Lewis county circuit court. *Reversed.*

Edward A. Brannon, for appellant.

William W. Brannon, for appellee.

DENT, P. This is a controversy between the town of Weston, defendant, and Er Ralston, plaintiff, over the right to a public easement in a small strip of land 13½ feet by 72½ feet, being a part of Water street, as originally laid off and dedicated to public use at a very early date, almost beyond the memory of man, by Maxwell and Stringer, who sold lot 12, adjacent to such trip, to those under whom plaintiff claims title. While plaintiff raises the question of dedication and acceptance, as is usual in similar cases, his main reliance is on adverse possession under a claim of title for a much longer period than the statute of limitations. From the evidence, this case clearly comes within the rules of law and principles determined in the cases of Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130, and Jarvis *v.* Town of Grafton, 44 W. Va. 453, 30 S. E. 178; for the reason that the original occupation of the strip in controversy, and the continuance thereof, was under the sufferance and permission of the municipal authorities, and no claim was made thereto, under the statute of limitations, until it was supposed that, under the decision in the case of City of Wheeling *v.* Campbell, 12 W. Va. 36, as followed in the cases of Forsyth *v.* City of Wheeling, 19 W. Va. 318, and Teass *v.* City of St. Albans, 38 W. Va. 1, 17 S. E. 400,

Case Stated.

the public easement therein was barred, and could not be regained except by recourse to the right of eminent domain. The original occupation not being adverse, it could not become so until the defendant had positive notice that the plaintiff was going to set up a claim of title perfected by adverse possession. Hutson *v.* Putney, 14 W. Va. 561; Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Creekmur *v.* Creekmur, 75 Va. 430; 1 Am. & Eng. Enc. Law (2d Ed.) 798. If the plaintiff had at any time during his long possession given the defendant notice that he intended to hold the land adversely, there is no doubt he would at once have been dispossessed, and no lapse of time, and no possession of a portion of a street not required by the present necessities of the public, could raise the presumption of such notice; for the reason that there is nothing inconsistent with a public easement for the authorities to allow an abutting landowner the temporary occupation of a public highway not demanded for the present use of the public. It requires great labor and expense to grade, curb, and pave the streets of a town, and it is never done until the exigencies of the public demand it, and unused streets are allowed to lie idle until such requirement, and in the meantime there is no good reason why abutting lot owners may not use unoccupied portions of such street for private purposes, so long as such use does not interfere with, but is entirely subordinate to, the public use thereof. Such has long been the custom, and would continue so, to the benefit of individuals and without hurt to the public, were it not for the baneful effect of the conclusion arrived at by this court in the case of City of Wheeling *v.* Campbell cited.

The question of dedication and acceptance is hardly worthy of consideration, from the fact that plaintiff is not the original owner of the land, but claims under a deed and plat by which such street was dedicated to the public, and, it being inconsistent with his title papers, he is estopped from denying such dedication. Such dedication was not an act of his, but was long prior to his

Streets—Dedication—Estoppel.

deed, which recognized and adopted the same. The same may be said of the acceptance by the defendant. It was perfect before his title accrued, in subordination thereto. Jarvis *v.* Town of Grafton and Taylor *v.* Philippi, before cited; Riddle *v.* Town of Charlestown, 43 W. Va. 796, 28 S. E. 831; Taylor *v.* Com., 29 Grat. 780; Depriest *v.* Jones (Va.) 21 S. E. 478; Buntin *v.* City of Danville, 93 Va. 200, 24 S. E. 830; 9 Am. & Eng. Enc. Law (2d Ed.) 46.

Although, on the question of adverse possession, plaintiff has failed to make out his title, yet as this question is of such general importance, and has been so ably and exhaustively argued by the attorneys of both parties, the court would be derelict in its duty not to squarely meet the issues raised, and fearlessly settle them for the public good. The point is at once presented whether the law justifies the court in reviewing, disapproving, or modifying the doctrines enunciated, and conclusion reached, in the case of City of Wheeling *v.* Campbell, followed in the cases of Forsyth *v.* City of Wheeling and Teass *v.* City of St. Albans, and recognized in the cases of Taylor *v.* Philippi and Jarvis *v.* Town of Grafton, all heretofore cited.

The case of City of Wheeling *v.* Campbell, while ably considered in following the supposed weight of authority, is a plain and palpable misapplication of the statute of limitations to the sovereign rights of the people. That the statute of limitations applies to municipal corporations there can be no question; that it now applies to the state in like manner as to individuals, by express statutory provision, there can be no question; but it does not apply to the sovereign rights of the people, except as they are restricted in the constitution by their manifest will therein contained. In the case of Levasser *v.* Washburn, 11 Grat. 576, quoted and approved by JUDGE JOHNSON in the case of City of Wheeling *v.* Campbell, JUDGE LEE says: "It is a maxim of great antiquity in the English law that no time runs against the crown, or, as it is expressed in the early law writers,' *Nullum tempus occurrit regi.*' The

Municipal Corporations—Limitations.

reason sometimes assigned why no laches shall be imputed to the king is that he is continually busied for the public good, and has no leisure to assert his rights within the period limited to his subjects. A better reason is the great public policy of preserving public rights and property from damage and loss through the negligence of public officers. This reason certainly is equally, if not more, cogent, in a representative government, where the power of the people is delegated to others, and must be exercised by these, if exercised at all; and accordingly the principle is held to have been transferred to the sovereign people of this country, when they succeeded to the rights of the king of Great Britain, and formed independent governments in their respective states. And, though it has sometimes been called a prerogative right, it is, in fact, nothing more than an exception or reservation introduced for the public benefit, and equally applicable to all governments." The constitution of this state clearly shows in whom all sovereign rights reside. Section 2 of article 2 declares: "The powers of government reside in all of the citizens of the state and can be rightfully exercised only in accordance with their will and appointment." Section 2, art. 3, declares: "All power is vested in and consequently derived from the people. Magistrates are their trustees and servants and at all times amenable to them." The people, in their collective capacity, are sovereign. To them all so-called "prerogative rights" belong, and from them they cannot be taken, or in any wise diminished, except in accordance with their own appointment. This state has no so-called "crown lands" or public domain, except its public highways, including roads, streets, alleys, and other thoroughfares devoted to the use of the general public, and also probably a few public squares and buildings. There are no parks which belong exclusively to the general public. State lands are only held temporarily, until they can pass into the hands of private individuals, who will pay the taxes thereon. So that we can well say that its highways are the only property the people of West Virginia hold in

their sovereign capacity, and in these every individual has the same right, from the least to the greatest, and from which no one, however weak or small or mean, can be excluded. These are dedicated to the public business of the country, to its traffic and commercial interests, and without which the same could not thrive, if even exist. They are the pathways of communication from house to house, town to town, city to city. They are absolute necessities for the happiness, comfort, and well-being of the people. The man who would destroy them, if he could, is an enemy to the community, fit only "for treason, stratagem, and spoils." It matters not whether they be in the town or country, the same protecting ægis watches over them, and this is the sovereignty of the people. The public do not hold the title in fee. It may be in the original owner, the abutting lot owners, the municipality, or state, and there it rests in abeyance as long as the land is needed by the public, who hold only an easement therein. This easement is more potent because of its sovereign character, and while it exists entirely suspends the title, or renders it temporarily nonexistent; for no man dare assert it. The word "state" is generally used to denote three different things, and often without discrimination: First, the territory within its jurisdiction; second, the government or governmental agencies appointed to carry out the will of the people; and, third, the people in their sovereign capacity. The state is not the sovereign in this country. The people who make it are sovereign, and all its officers are but their servants. So, statutes of limitation, which are made to apply to the state, do not apply to the people or their public rights. But they only apply to the state in the same cases that they apply to individuals. The entry upon, or recovery of, lands held for sale, suits on bonds, contracts, evidences of debt, or for torts,—all these, though the state is a party, are subject to bar. As to all such things, there is no reason why the state should have any longer time than an individual. Such is not the case with the right of taxation,

the right of eminent domain, the right to use the public highways, and other rights, which pertain only to the sovereignty of the people. None of these can ever be lost by the negligence of the public servants, who have no power of disposal over them in any way whatever, except according to the express will of the people. It would be a strange thing for an individual to plead the statute in bar of the right of eminent domain, which is said to be the right of the people to take private property for public use. The right to keep it for public use should be as extensive as the right to take it; for one would be useless without the other. The former is said to be an attribute of sovereignty, and why not the latter? Some law writers, at least, estimate that the state, as representative of the people, may both take, hold, and control property for public use, under the right of eminent domain, "as the public safety, necessity, convenience, or welfare demand. Cooley, Const. Lim. 524. Others limit the meaning of "eminent domain" in its application to the appropriation by a sovereign state of private property for particular uses, for the benefit of the public. "All other exercises of power over private property, and every species of right in, and control and regulation over, property of a public nature, may properly be referred, as we have shown, to some other of the sovereign powers of the state." Lewis, Em. Dom. § 2. This author refers the holding of property to the sovereign right of proprietorship for the public good. In all cases where the sovereign rights of the state are referred to, the state is spoken of as representative of the people, and not of the territory, or the government, or its agencies. The state, in its governmental capacity, has no right to alien, or authorize the alienation, of the public highways, except for the public good; but it may provide subagencies to control, make, repair, and otherwise exercise complete supervision over such highways, and make such agencies responsible for the good condition thereof, through their servants. Such it has done, by turning the roads, streets, alleys, and other thoroughfares over

to the counties, districts, and municipalities, being the political divisions in which they are respectively located, and has authorized such agencies to close, vacate, change, alter, or discontinue any of them no longer of benefit to the public. But such agencies have no right to sell, alien, or dispose of such highways in any manner, except as provided by statute. Nor can any individual destroy the public easement in such highway by any act of his own. It is a new quality given to land, when dedicated to the use of the public as a highway. And it is one that an individual can neither acquire nor enjoy by himself. When land ceases to be a highway, this quality no longer attaches to it, but it is utterly destroyed or becomes extinct. It belongs to the public, and not to the state, county, or municipality that may in their governmental capacities, under their police and administrative powers, regulate and control it in such manner as will conduce to the public welfare, and may destroy it if in accord with the sovereign will of the people, but not otherwise. If the easement is destroyed by the proper agency of the people, the title is revived, and the land reverts to the owner of the fee, whether it be the municipality, the abutting owners, or the original owner who first dedicated it to public use. If the easement is interfered with by an individual while it is alive, such interference is a public nuisance, and it matters not how long it is continued, it can never destroy the easement; for it is under the ban of the law, and subject to abatement at any time. A nuisance can never oust a public easement, no more than an individual can take away the sovereignty of the people. He may forfeit his property and rights to them, but they can never, in a popular government, forfeit their sovereignty to him. He may cease to be a part thereof, but cannot enjoy more than his equal share therein. His nuisance must yield to their sovereignty, whenever they see fit, through their proper agencies, to exercise it. Once a nuisance, always a nuisance; once a highway, always a highway, until legally discontinued, changed, or altered. Norfolk City

v. Chamberlaine, 29 Grat. 534; Taylor *v.* Com., *Id.* 780; Yates *v.* Town of Warrenton, 84 Va. 337, 4 S. E. 818; Depriest *v.* Jones (Va.) 21 S. E. 478; Buntin *v.* City of Danville, 93 Va. 200, 24 S. E. 830; Board of Sup'rs of Logan Co. *v.* City of Lincoln, 81 Ill. 156; Driggs *v.* Phillips, 103 N. Y. 77, 8 N. E. 514; City of Vicksburg *v.* Marshall, 59 Miss. 563; Rae *v.* Miller, 99 Iowa, 650, 68 N. W. 899; Wolfe *v.* Pearson, 114 N. C. 621, 19 S. E. 264; Crocker *v.* Collins, 37 S. C. 327, 15 S. E. 951; Williams *v.* City of St. Louis, 120 Mo. 403, 25 S. W. 561; Ulman *v.* Charles Street Ave. Co., 83 Md. 130, 34 Atl. 366; Coleman *v.* Thurmond, 56 Tex. 514; Webb *v.* City of Demopolis, 95 Ala. 116, 13 South. 289; City of Visalia *v.* Jacob, 65 Cal. 434, 4 Pac. 433; Wolfe *v.* Town of Sullivan, 133 Ind. 331, 32 N. E. 1017; City of Quincy *v.* Jones, 76 Ill. 231; Elliott, Roads & S. 668.

Same—Same.

The reason given by JUDGE JOHNSON why the maxim of "*nullum tempus*," etc., cannot apply to municipalities, is "that it only applies to sovereignty, and the sovereign cannot transmit it to persons or corporations. A municipal corporation cannot claim exemption under it, any more than a natural person, although it may hold property in trust for the public." In short, that if a sovereign intrusts his property to a trustee to take care of for him, when one of his subjects presents himself and wrongfully proposes to appropriate the sovereign's property to his own use, the trustee cannot defend it as the property of the sovereign, but must let it go. So it may be said of the county. So it may be said of the state, and every other public officer or agency; for they are all merely trustees and servants of the people. And, if such trustees are powerless to protect the rights of the sovereign people, then such sovereign has no rights that can be protected from individual encroachment, for the reason that the sovereignty of the people must be asserted through such governmental agencies or not asserted at all. JUDGE JOHNSON invests the state with sovereignty which belongs alone to the people, and of which the state is the mere trustee, except when the word is used

in a broad sense, to designate the people, and not governmental agencies. The people have the power to impose the duty of protecting their sovereign rights on any public agency or individual officer or person they may see fit and proper, and the fact that they do impose such duty on trustees or agents cannot possibly destroy such rights without their consent. And it is the duty of every man, woman, and child in this state, who enjoys the protection of the laws of the land, including the use of its highways, to aid in preserving such public sovereign rights intact, instead of seeking to overthrow and destroy them. The king of England intrusted his highways to supervisors and local authorities, yet it never entered even the imagination of his subjects that by reason thereof they could acquire rights against him in his highways by means of nuisances maintained therein for any length of time. The people of this country succeeded to all his rights, and more than he are compelled to transact their business through local agencies, and there is no more reason that they, by so doing, should lose their rights than he. Their sovereignty is far more pervading than his, for it has representation of pure blood in every household throughout the length and breadth of their domain. The oversight in the learned judge's opinion, and the numerous decisions on which he places his reliance, is his failure to distinguish the municipality in its private, ministerial, and local governmental capacities from the municipality in its higher governmental capacity as the agent of the public, charged with the duty of preserving the sovereign rights of the people. The municipality, though it may own the fee, is not the owner of the public easement in the land. This, as heretofore shown, belongs to the people, and cannot exist apart from them. This the municipality cannot alien or dispose of in any manner except in accordance with the express will of the people, for their benefit. The statute of limitations, as relied on by the plaintiff, is not to bar any right the municipalty has in the street, but to destroy the public easement. It is not a plea

Public Easements in Highways—Whether Destructible.

against their trustee, but a plea against the people in their sovereign capacity. If sustained, it does not oust the municipality, for its governmental control thereover still remains, but it ousts the people, even taking away their own right to use the street as a public highway. The same argument would deprive the people of any highways in the state if its governmental agencies are only neglectful of their duties; for all their highways are intrusted to local agencies. The doctrine of "*nullum tempus*," etc., must apply to the rights of the people as the sovereign, it matters not what agency is intrusted with their care, or it must be altogether discarded in a popular form of government. And the people must be known as the uncrowned king, without a kingdom. Such sovereignty would be as helpless as Gulliver when staked to the ground by Lilliputians with hairs from his own head. The argument that municipalities should be specially diligent in looking after the rights of the people, or the people should suffer the loss thereof, is applicable to any public agency as well as municipalities, in England as well as in America, and it was the want of such diligence, and the negligence of such agencies, that furnished the most reasonable foundation for the doctrine "*nullum tempus*," etc. To repeat JUDGE LEE'S language: "A better reason is the great public policy of preserving public rights and property from damage and loss through the negligence of public officers." It does not matter whether such officers belong to a municipality, district, or a county, they are all public officers, so far as the public highways are concerned, and their negligence has the same disastrous effect on the public. City of Charleston *v.* Beller, 45 W. Va.—, 30 S. E. 152. The only logical conclusion that can possibly be reached is that the public easement in all the highways of the state, wherever situated, is sacred from individual encroachment, and all interference therewith, by private interests, is a continuing public nuisance, subject to abatement whenever the growing necessities of the people require such easement for the uses to which the land to which it attaches was originally

Same—Same.

dedicated. O'Conner *v.* Pittsburgh, 18 Pa. St. 187. This conclusion, though adverse to city of Wheeling *v.* Campbell, is sustained by a vast and increasing weight of authority, including England, Canada, the United States, the states of Alabama, California, Colorado, Indiana, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New York, New Hampshire, North Carolina, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Washington, Wisconsin, and Virginia. Many of the authorities have been heretofore cited. See, also, 1 Am. & Eng. Enc. Law (2d Ed.) 878–880, where the authorities *pro* and *con* are collected. Whenever a decision of this court is found, on careful consideration, to be illogical, opposed to public policy, and subversive of the supreme law of the land, the public welfare, and the sovereignty of the people, and, while not a nuisance *per se*, is the bulwark of nuisances and defense of unconscionable private demands, the source of continual local strife and litigation, and destructive of the peace of whole communities, it is the solemn duty of this court to disapprove it and end its evil influences. Lieb. Herm. 208; 23 Am. & Eng. Enc. Law, 36; Mayer *v.* Frobe, 40 W. Va. 246–262, 22 S. E. 58. The decision in the case of City of Wheeling *v.* Campbell, instead of being a matter of repose, appealing, as it does, to the cupidity of human nature, has opened wide the door to numerous encroachments on the rights of the people by those whose selfish covetousness blind their eyes to the greater obligation they owe to the sovereign power in this land, which secures to them the blessings of liberty protected by law. Every law-abiding citizen, who loves, respects, and cherishes the institutions of his country, is charged with the patriotic duty, through fealty to the people, to preserve all public rights intact. If there are those whose sentiment of public obligation is so weak as to cause them, through their promptings of private gain, to become exploiters of public rights, they should find no countenance in the decisions of the

Same—Same—Limitations.

courts. The law can never be made the instrument of its own destruction in the hands of lawbreakers, nor should it afford protection where the allegiance is wanting. The doctrine of *stare decisis* cannot be invoked to perpetuate public nuisances or destroy the sovereignty and welfare of the people. The cases of City of Wheeling *v.* Campbell, Forsyth *v.* City of Wheeling, and Teass *v.* City of St. Albans, in so far as they hold that public easements in the public highways can be destroyed by private individuals contrary to the sovereign will of the people, are hereby disapproved as erroneously propounding the law.

Nor does the doctrine of estoppel apply in such cases. Roper *v.* McWhorter, 77 Va. 214, 222; 1 Dill. Mun. Corp. §§ 96, 381, 749; Green's Brice, *Ultra Vires*, 42, 597; Mayor *v.* Ray, 19 Wall. 468; Williamson *v.* Jones, 43 W. Va. 562, 574, 27 S. E. 411; Webb *v.* City of Demopolis, 95 Ala. 116, 13 South. 289, 1 Am. & Eng. Enc. Law, 882. The statute of limitations is a mere legal estoppel, and, if not applying to legalize a public nuisance, neither does equitable estoppel; for equity follows the law, and will grant no relief to a lawbreaker or wrongdoer. Clean hands and a clear title are always equitable requirements. Bell *v.* City of Burlington, 68 Iowa, 296, 27 N. W. 245; Cheek *v.* City of Aurora, 92 Ind. 107. In 2 Dill. Mun. Corp. (4th Ed.) § 675, it is said: "Such a corporation does not own, and cannot alien, public streets or places, and no mere laches on its part, or on that of its officers, can defeat the right of the public thereto; yet there may grow up in consequence private rights of more persuasive force in the particular case than those of the public. * * * The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel in *pais*, as applicable to exceptional cases, since this leaves the courts to decide the question, not by mere lapse of time, but, upon all the circumstances of the case, to hold the public estopped or not,

as right and justice may require." In this the rights of the people are confounded with the rights of the municipality. How can equitable estoppel, any more than the statute of limitations, deprive a sovereign of his rights, and permit his subjects to destroy them by their wrongful conduct? The use of their highways is a sovereign right, common to all the people, and of which they cannot be devested, except in accordance with their will and appointment for the public weal. The law is best enunciated in the case of Webb *v.* City of Demopolis, 95 Ala. 116, 13 South. 289, where it is held that "a city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or laches in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of a city to maintain a suit in equity to remove the obstruction." The words, "holds them in trust," are objectionable; for the reason that the people generally hold them and own the public easement, and the municipality merely has authority to supervise and keep them in repair and free from obstructions, for the benefit of the whole people and the stranger within their gates. There may arise cases of particular hardship, where, through the negligence or mistake of the public officers, valuable permanent improvements, under a *bona fide* claim of right, may be erected by the abutting lot owner, invading and destroying, without wrongful intent, the public easement in a portion of the adjacent street. Such mistakes are often occasioned by different surveyors, with different instruments. Such invasion is sometimes slight in comparison with the improvements made, and at other times it is much more serious, not only destroying the public easement, but interfering with the regularity and symmetry of the street. To abate such structures as an ordinary nuisance would be a tyrannical act of governmental power, which finds no lodgment in the breasts of a free and just people. The mistake

having been mutual or occasioned by the negligence of the public, and the property owner being free from evil intent, the loss should fall on the people, as most able to bear it, rather than on the individual, who may be rendered bankrupt if he must endure it. Such cases are provided for in section 9, art. 3, of the constitution, in these words: "Private property shall not be taken or damaged for public use without just compensation." This is a limitation put on the sovereignty of the people by the sovereign itself. It is intended for the public good, and to prevent oppression and injustice. Whenever private property is taken or damaged for public use, it must be done through the public officers, acting as the agents of the people. And for these same officers to mislead, either by acts of omission or commission, a private person into building a costly structure over the line of a public highway, in the belief that he was within the limits of his own property, and then demolish or remove it as a public nuisance, would be taking and damaging private property for public use without just compensation. Hence, to regain the use of the highway lost in this manner, they must do so under the right of eminent domain, in so far as the intrusive structure is concerned. The land need not be condemned, but the damage to the structure, by the removal thereof, should be paid. Such exception does not apply to one who knowingly invades a highway. He must bear the loss occasioned thereby, and not the public. It is his own injury, and he must endure it alone. In the present case, the plaintiff, fully informed by his title papers of his rights, willfully invaded the street. In the case of Spencer *v.* Railroad Co., 23 W. Va. 406, JUDGE GREEN, on page 422, intimates that the abutting lot owner's title extends to the middle of the highway. If such be the law, the title to the land in controversy is in plaintiff, subordinate, however, to the public easement; and, so long as he did not interfere with the public, he had the right to use this land for his private purposes, but, as soon as the neces-

Eminent Domain—Right to Compensation.

Notes

sities of the public required, he should have yielded it without controversy. This would have been in accord with his higher duty to the public, and would have showed that, in occupying the land, he was not actuated with any unlawful motive. But when he refused to surrender his possession, on demand of the proper legal authorities, he became guilty of maintaining a public nuisance, subject to abatement, either by the municipal authorities, under their statutory powers, or by an appeal to a court of equity. This cause having been instituted in a court of equity, it will not be dismissed without doing complete justice between the parties. Hotchkiss *v.* Plaster Co., 41 W. Va. 367, 23 S. E. 576. The decree complained of is reversed, and this cause is remanded to the circuit court, with direction that the plaintiff's injunction be dissolved, and that a mandatory injunction be awarded the defendant, at the plaintiff's costs, directing the plaintiff to abate the nuisance maintained by him thereon, and that the strip of ground in controversy be restored to Water street, and made subject to the public easement therein, and to be further disposed of according to the principles of equity.

NOTES.

Dedication—Purchasing with Reference to Plat—Estoppel.—In Reed *v.* Mayor, etc., of City of Birmingham (Ala.), 33 Am. & Eng. Corp. Cas. 469, it was held that where land has been surveyed with the purpose of having a city built thereon, and a plat thereof made setting forth the width, location, and course of the streets and lots, and a portion of such land is sold by describing it as bounded by certain of the streets so laid out and platted, the purchaser is estopped from disputing the existence and width of the streets as surveyed; by entering into his purchase with reference to the plat, he perfects the offered dedication and establishes the streets as public highways. Citing City of Demopolis *v.* Webb, 87 Ala. 959; M. E. Church *v.* Mayor, etc., of Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696, and note; Mayor, etc., of Jersey City *v.* Morris Canal, etc., Banking Co., 12 N. J. Eq. 547; Sims *v.* Chattanooga, 2 Lea, (Tenn.) 694; Com. *v.* McDonald, 16 S. and R. (Pa.) 390; Maywood Co. *v.* Village of Maywood, 118 Ill. 61, 13 Am. & Eng. Corp. Cas. 505.

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Public Easements in Highways—Destruction by Prescription.—In Reed *v.* Mayor, etc., of the City of Birmingham (Ala.), 33 Am. & Eng. Corp. Cas. 469, the court said: The bill shows on its face that for more than 10 years before this suit was instituted the defendant took possession of the strip of land claimed to be a part of the street, inclosed it with a fence, and has held possession of it, as of right, ever since. Ten years' adverse holding, under our statute, bars entry upon real estate, unless the case is brought within some of the exceptions. To block up or unduly obstruct a public street is a public nuisance, and chancery, at the suit of the corporation, will enjoin its continuance. Is the statute of limitations a bar against such relief? It would be needless to attempt to reconcile the authorities on this question. In Wright *v.* Moore, 38 Ala. 593, this court said: "We deem it proper to remark that there can be no prescription for a public nuisance." This was probably *dictum*, but the following numerous and highly respectable authorities assert the same doctrine: People *v.* Cunningham, 1 Den., (N. Y.) 524; Burbank *v.* Fay, 65 N. Y. 57; Driggs *v.* Phillips, 103 N. Y. 77; Henshaw *v.* Hunting, 1 Gray (Mass.), 203; Com. *v.* Upton, 6 Gray (Mass.), 473; Cross *v.* Mayor, etc., of Morristown, 18 N. J. Eq. 205; Yates *v.* Town of Warrenton, 84 Va. 337; Little Miami R. Co. *v.* Commissioners of Greene Co., 31 Ohio St. 338; Sims *v.* City of Frankfort, 79 Ind. 446; Rhodes *v.* Whitehead, 27 Tex. 304; Simmons *v.* Cornell, 1 R. I. 519; Hoadley *v.* San Francisco, 50 Cal. 265; Rung *v.* Shoneberger, 2 Watts, (Pa.) 23; Queen *v.* Brewster, 8 U. C. C. P. 208; Lewis *v.* Stein, 16 Ala. 214. The doctrine was broadly asserted in Olive *v.* State, 86 Ala. 88, 5 South. Rep. 663. That learned jurist and law writer, JUDGE DILLON,—2 Mun. Corp. § 675, (533,)—after noticing the conflict of authorities on the question, gives his own views as follows: "Municipal corporations, as we have seen, have, in some respects, a double character,—one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. * * * But such a corporation does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto. * * * The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes." And in a valuable late work (the law of Roads and Streets, by B. K. & W. F. Elliott, p. 490) is this language: "There can be no rightful permanent possession of a public highway for private purposes, and, although a right to maintain a private nuisance may, in some cases,

be acquired by prescription, no length of time will render a public nuisance, such as the obstruction of a highway, legal, or give the person guilty of maintaining it any right to continue it to the detriment of the public." We hold that the present proceeding is not barred by the lapse of time, and the decree of the chancellor is affirmed.

ARMSTRONG
v.
BROWN *et al.*

WRIGHT *et al.*
v.
CLARK *et al.*

(*Court of Appeals of Kentucky, March 10, 1899.*)

Animals Straying on Streets—Power to Sell.*—A city of the fourth class having the power by ordinance to regulate and prohibit the running at large of stock on its streets, has by implication the power to authorize the sale of such animals after a judicial determination by some tribunal that such an ordinance has been violated.

Same—Same—Notice to Owners.*—A written notice describing the property, posted at the court-house door and at the city pound for five days before the day of the trial to determine whether the animals described were at large on the city streets in violation of an ordinance, is sufficient notice to render a sale of the animals and the preliminary proceedings valid.

Same—Same—Same.—The owner of such animals sold after he had such constructive notice, and another five days before the sale in which to redeem them, cannot complain that, by reason of insufficient notice he was deprived of his property without due process of law.

APPEAL by plaintiffs from Marion county circuit court. *Affirmed.*

S. A. Russell, for appellants.

H. W. Rives, for City of Lebanon.

John W. McChord, for appellees.

WHITE, J. These two cases involve the same question, and are identical save parties, and will be determined

*See notes at end of case.

together. The appellants brought these actions in replevin for the delivery of certain live stock, horse and mule, against appellees, the board of councilmen of the city of Lebanon, the chief of police, and the purchaser of the stock. The answer pleads, by way of defense, that the property sued for was, under an ordinance duly and regularly passed by the city of Lebanon, taken charge of by the chief of police, and impounded, and, after notice as provided by the ordinance had been given, the said property was, by the judgment of the city court, declared to be forfeited and ordered sold; that after due notice of the time and place of sale, as required by the ordinance, the property was sold at public outcry to the highest bidder; and that one of appellees became the purchaser of the property, and that this was the wrongful seizure and possession complained of. The ordinances were set out in full, and a certified copy filed with the answer. To this answer a demurrer was overruled in each case, and, appellants declining to plead further, the petition was dismissed absolutely. From that judgment these appeals are prosecuted.

Case Stated.

The sole question presented by these appeals is the validity of the ordinance of the city of Lebanon approved April 12, 1894, entitled "An ordinance to prevent the running at large of live stock in the city of Lebanon, to provide for a pound, a poundmaster and for other purposes." This ordinance provides, in sections 1 to 4, that it shall be unlawful for certain kinds of stock, including the kinds here sued for, to roam or be at large, within the corporate limits; and that it shall be the duty of a policeman to seize any such stock found on the street; and permitting any citizen upon whose premises the stock may go to seize the stock, in either case to be delivered to the poundkeeper; and making it the duty of the person taking up such property to report in writing such fact within 24 hours to the police judge of the city of Lebanon, together with a description of the stock and the name of the owner, if known, and, if the owner be unknown, shall so

state. This report shall be sworn to. Section 5 provides for summons issued against the owner, returnable not less than three days from the issual, to show cause why the stock shall not be sold, etc. Section 6 provides: "When the name of the owner of any stock taken up is not known, no summons shall be issued, but it shall be the duty of the police judge to post at the court house door in the city of Lebanon, and at the city pound, a written or printed notice, describing the stock taken up, and when and by whom, and the amount of damages claimed, if any, and requiring the owner to appear before the Lebanon police court, at a time specified in the notice, not less than five days from the posting of the notice, to show cause, if any he can, why the stock shall not be sold as provided by this ordinance." Section 8 provides: "If the owner of any stock taken up under the provisions of this ordinance, after being notified as provided in section 5 or section 6, shall fail to appear and defend, or if his defense be adjudged insufficient, the court shall enter judgment directing the chief of police to sell the stock for the payment of fees, costs, and damages assessed against it, and the sale shall be made and reported to the next term of the court thereafter. Every sale made under this ordinance shall be between the hours of 10 o'clock a. m. and 2 o'clock p. m. in front of the court house door in the city of Lebanon, on a credit of 30 days, with approved security, and after notice of the time, place and terms of this sale shall have been posted at the court house door and at the city pound for five days prior thereto." The remaining sections provide that the excess of the proceeds of sale over the fees, etc., shall be retained in the city treasury for the benefit of the owner, and paid upon his demand or order, and for the election of a poundmaster, and the fees and costs incident to the impounding, trial, and sale, and redemption before sale. The answer specifically alleges a compliance with each provision of the ordinance, the owner of the property being unknown, and not appearing either at the time fixed in the

notice for trial, or with an offer of redemption. Each step taken is set out in the answer, from the taking up to the sale and payment of the purchase price.

Lebanon is a city of the fourth class, and its charter is found in Ky. St. §§ 3481-3606, both inclusive. Subsection 31 of section 3490 ("Powers of the General Council") provides: "The board of council shall have the right to establish and maintain a pound, and make proper regulations for the impounding, keeping stock, fixing fees for same and release of same, and regulate and prohibit the running at large of stock on the streets of the city." It is clear that the ordinance passed was in pursuance of the authority, or supposed authority, of this charter provision.

It is insisted, however, for appellants, that, under this provision of the charter, the council had no power to authorize a sale or forfeiture of the property impounded, but that it could only fix a penalty against the owner, if in fault, and fix certain fees and charges as a lien on the property, and retain the property till the lien be satisfied. It is contended that the language, "and make proper regulations for the impounding, keeping stock, fixing fees for same and release of same, and regulate and prohibit the running at large," etc., is exclusive of all other power, and that, as the power of sale is not mentioned, it is not given. We are of opinion, on the authority of the cases of McKee *v.* McKee, 8 B. Mon. 433, and Varden *v.* Mount, 78 Ky. 86, that the city council of Lebanon had full authority to pass the ordinance in question, in so far as it authorizes a sale of the property impounded after a judicial determination by some court that the ordinance has been violated, in permitting the stock to be at large. The charter provisions in those cases were not as strong or as clear as in these, yet they were upheld in so far as it provided for a forfeiture and sale.

Animals Straying on Streets—Power to Sell.

It is insisted that, if the charter authorizes a forfeiture and sale after judicial determination of a violation, still the sale

and proceedings herein are void, because the notice required, and the only one alleged to have been given,—a posted written notice, describing the property, at the court-house door and at the city pound for five days before the day of trial,—is unreasonable, being too short, and as it is not alleged that appellants, the owners, had actual notice of the trial or proceedings; that, therefore, there was no notice, and appellants are bound by the trial and judgment of the police court on such notice; and that to thus deprive these appellants of their property is a violation of the constitutional guaranty of the rights of property, and that they shall not be deprived thereof without due process of law; that it is merely a confiscation, under pretense of the forms of law, of which appellants had neither actual nor reasonable constructive notice. The validity of ordinances of this character has repeatedly been before the courts, and the reports of the various states contained many adjudged cases bearing on this question. Some courts have held that the power to pass ordinances providing for summary process and sale was legal, and not unconstitutional, as they were within the exercise of the police power, and were of the character of laws that permits the destruction of a building to prevent the spread of fire, or the summary killing of domestic animals to prevent the spread of disease. The other courts hold that the better rule is that, before a forfeiture and sale, there must be some judicial proceeding. With the latter class our courts seem to have agreed, and we think properly so. It is clear that the impounding must be summary, but that there should be some judicial determination of a violation of the ordinance we entertain no doubt.

Same—Same—Notice to Owners.

The serious question arises, is five days sufficient time for constructive notice, with another five days before sale in which the owner may redeem? The proceeding to forfeit and order a sale is in *rem*, and can only affect the property impounded. Without a regular service in process and trial, the owner could not be fined, or adjudged to be indebted, exceeding the value of

Same—Same—Same.

Notes

the animal impounded. This being true, the fees and costs of keeping the stock must be paid out of the proceeds of sale, and to require longer notice before trial would add more cost for the keeping of the animal, to be paid by the owner or retained from the proceeds of the sale. If the unknown owner was treated as a nonresident, and a warning order made for 60 or 90 days, the cost of keeping would often equal, if not exceed, the value of the property. So, from the very nature of the case, it is necessary, in the interest of the owner and the city, that the property should be sold as early as may be done; giving a reasonable opportunity to the owner to be heard, or, as commonly said, "to have his day in court." We are of opinion that public posted notice for five days, as required by the ordinance, was reasonable and sufficient to sustain jurisdiction of the police court to declare a forfeiture and render judgment of sale. The reasonable presumption is that personal property, when sold at public outcry, after notice publicly given as provided, will bring their fair market value. After the legal charges and fees are deducted, the owner, by applying to the city treasurer, is entitled to the balance of the proceeds of the sale. The proceedings had in these cases appear to have been regular, and the ordinance was strictly followed. In our opinion, the answers presented a complete defense, and the demurrers thereto were properly overruled. Judgment affirmed in each case.

NOTES.

Forfeiture of Strays.—Sometimes the power to forfeit animals found running at large is conferred upon the municipality. But this power cannot be exercised without previous actual or constructive notice to the owner and the establishment of the forfeiture by legal proceedings. Rosebaugh *v.* Saffin, 10 Ohio, 32; Jarman *v.* Patterson, 7 Monroe, 647; McKee *v.* McKee, 8 B. Monr. 433; Heise *v.* Columbia, 6 Rich. 404; Whitfield *v.* Longest, 6 Ired. L. 288; Donovan *v.* Vicksburg, 29 Miss. 247; Poppen *v.* Holmes, 44 Ill. 362; Daist *v.* People, 51 Ill. 286; Kinder *v.* Gillespie, 63 Ill. 88; Cincinnati *v.*

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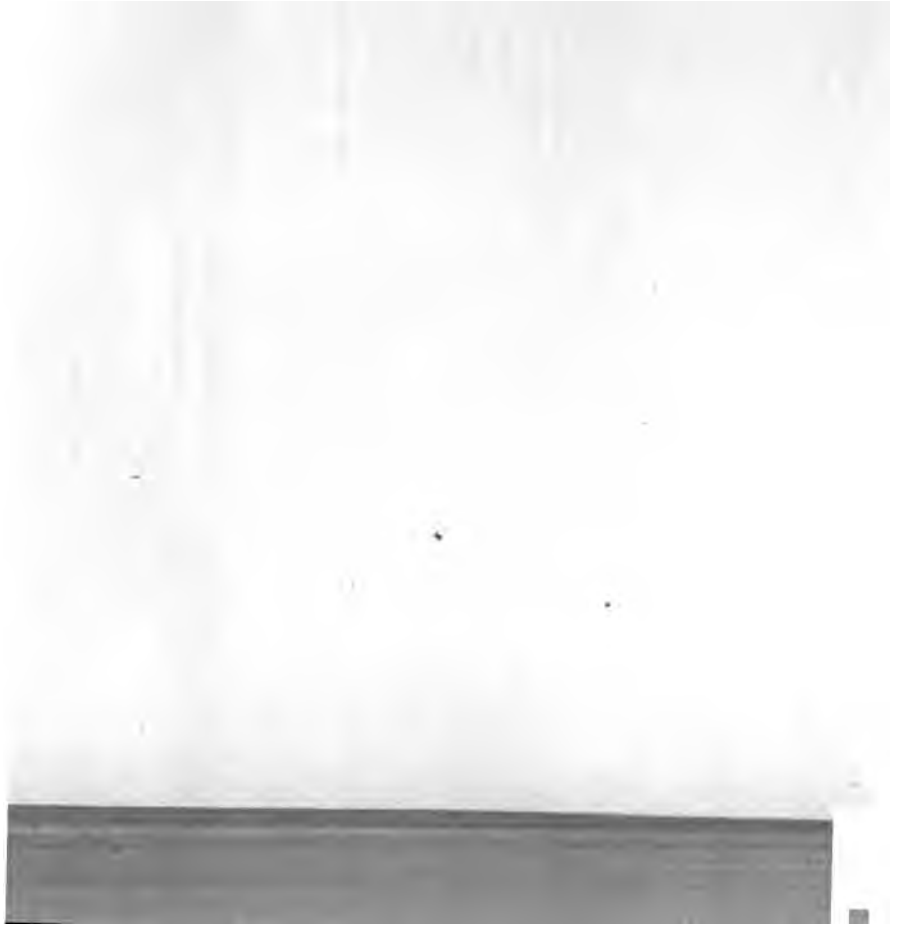
Buckingham, 10 Ohio, 257; Cotter *v.* Doty, 5 Ohio, 395; Varden *v.* Mount, 78 Ky. 86.

In Burdett *v.* Allen, 37 Am. & Eng. Corp. Cas. 468, 35 W. Va., 347, it was held that the charter of a city or town located in West Virginia, and the ordinances ordained by its council in pursuance of the provisions of sections 28 and 29 of chapter 47 of the Code, may, as an act of police regulation and power, provide for the taking up and impounding cattle, hogs, horses, sheep and other animals found running at large in the public streets during the night, and for selling them to pay charges for impounding, etc., without judicial inquiry or determination, upon notice being given to the owner; and such provisions will not be unconstitutional, as authorizing the forfeiture or confiscation of property without due process of law or without compensation.

Notice to Owner.—Notice by public advertisement is deemed sufficient. There is no necessity for personal notice. Shaw *v.* Kennedy, N. C. Term R. 158; Helen *v.* Noe, 3 Ired. L. 493; Whitfield *v.* Longest, 6 Ired. L. 168; Gilchrist *v.* Smidling, 12 Kans. 263; Gooselink *v.* Campbell, 4 Iowa, 296; Phillips *v.* Allen, 41 Pa. St. 481.

But see *contra* Willis *v.* Legris, 45 Ill. 289; Bullock *v.* Geomble, 45 Ill. 218; Poppen *v.* Holmes, 44 Ill. 360.

Fines upon Owners of Strays.—Fines may be imposed upon the owners of cattle found straying within municipal limits and in default of payment of the fine, sale or forfeiture of the cattle may be ordered. Kennedy *v.* Sowden, 1 McMull. L. 325; Crosby *v.* Warren, 1 Rich. L. 385; White *v.* Tallman, 2 Dutch, 67; Mayor of Mobile *v.* Yuille, 3 Ala. 137; Roberts *v.* Ogle, 30 Ill. 359; Waco *v.* Powell, 32 Tex. 258; Municipality *v.* Blanc, 1 La. Ann. 385; Kinder *v.* Gillespie, 63 Ill. 88.



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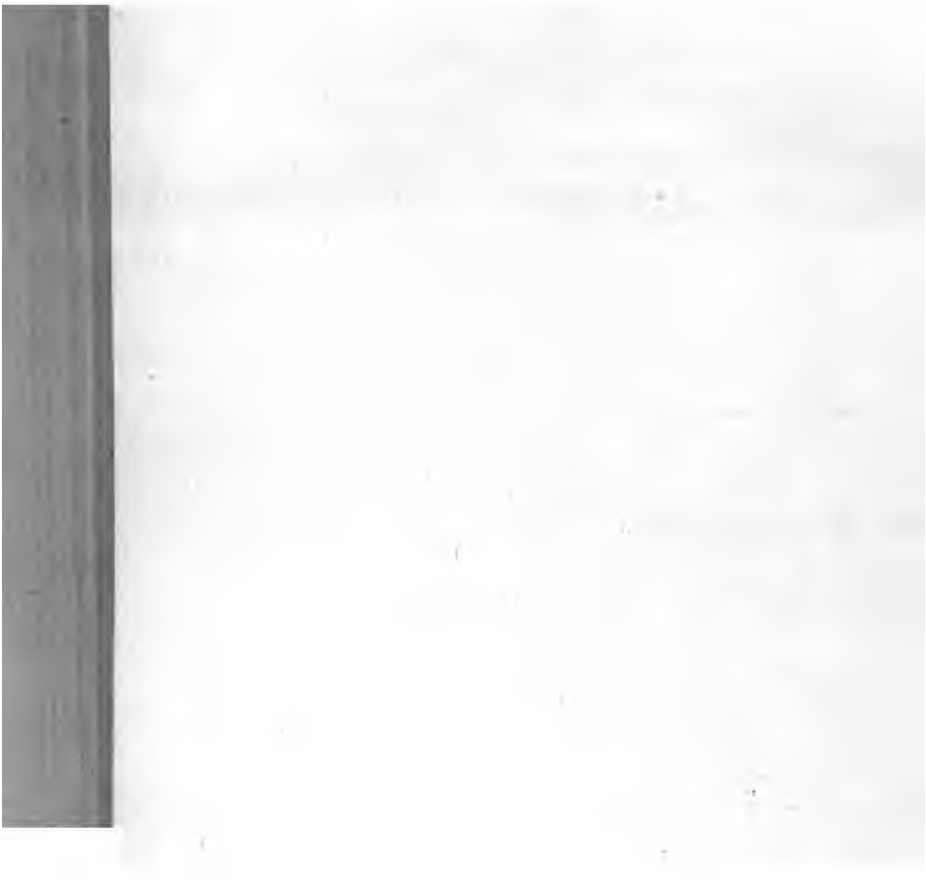

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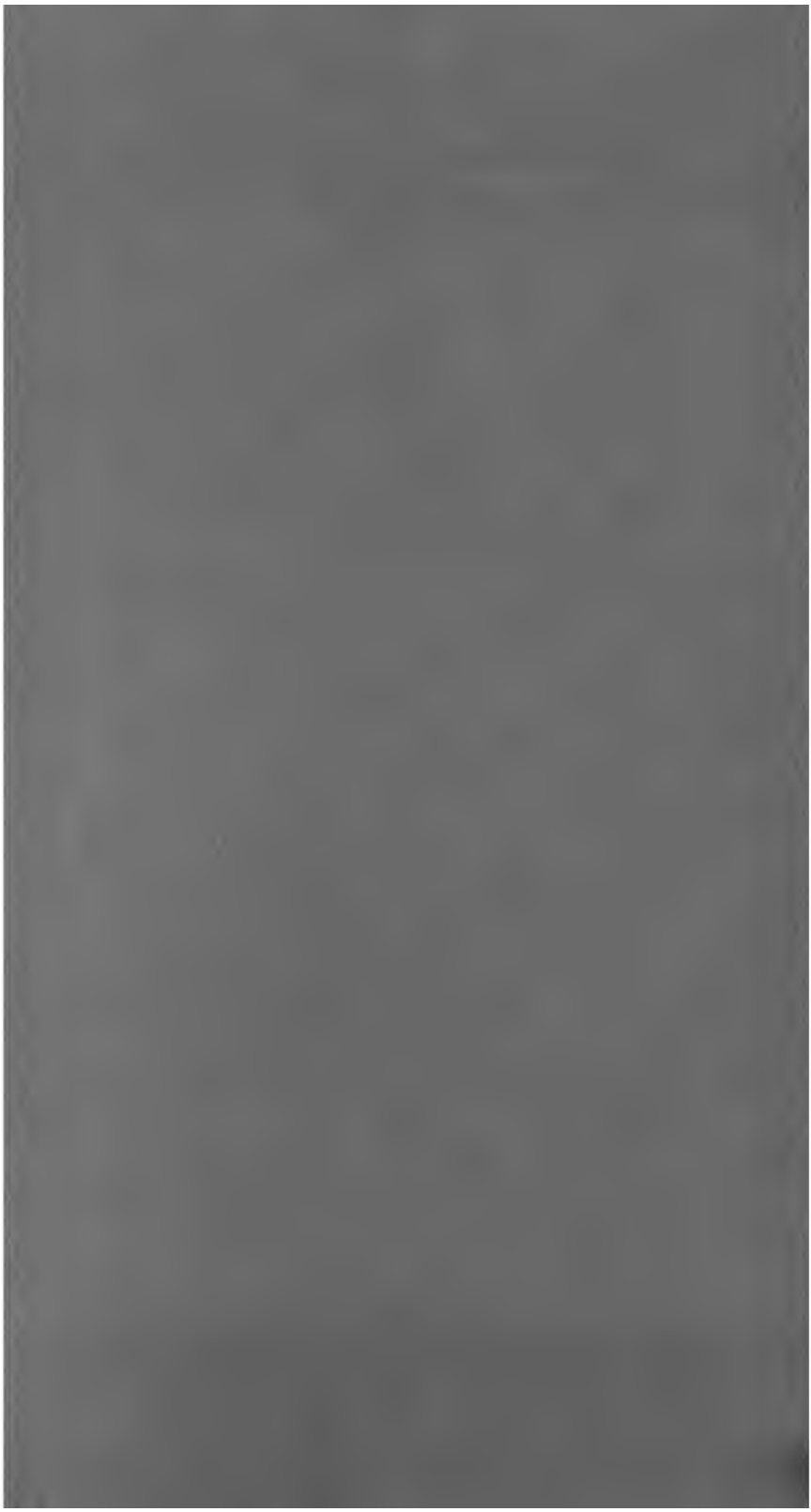

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